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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

STATE OF OKLAHOMA,

Petitioner,

vs.

CHESTER LEE BROOKS, A/K/A
ACHISSON AMENSHI AND
LARRY JOE BROOKS

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

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QUESTIONS PRESENTED

1. Whether the State of Oklahoma acquired criminal and/or civil jurisdiction over Indian allotments of the Five Civilized Tribes in the former Indian Territory.

2. Whether the State of Oklahoma has jurisdiction to enforce its tax laws on cigarette sales made on a restricted Creek allotment which is leased by individual Indians who are members of the Delaware tribe of Indians.

3. Whether the doctrine of "sovereign immunity" shields activities conducted on a restricted Indian allotment, by individual Indian lessees, from state regulation.

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The Petitioner, the State of Oklahoma ex rel. David Moss, District Attorney of Tulsa County, respectfully prays that a writ of certiorari issue to review the order of the Oklahoma Court of Criminal Appeals entered in this proceeding on October 14, 1988.

OPINIONS BELOW

The decision of the Court of Criminal Appeals for the State of Oklahoma, has, to date, only been reported in the Oklahoma Bar Journal, Vol. 59, No. 43, published November 19, 1988. This decision appears in Appendix A at 1a-18a, and was issued on rehearing on October 12, 1988 (filed of record on October 14, 1988).

The original decision issued by the Court of Criminal Appeals was filed on November 7, 1986 (App. B at 19a-32a), but was withdrawn, pursuant to an Order filed July 26, 1988 (App C at 33a-35a).

In addition, the decision rendered in the Tulsa County District Court, from which the appeal to the Oklahoma Court of Criminal Appeals was taken was issued on

November 9, 1984 (App. D, at 36a-74a).

JURISDICTION

The judgment of the Court of Criminal Appeals for the State of Oklahoma (App. A, at 1a-18a) was issued on rehearing on October 12, 1988 (filed of record on October 14, 1988). On December 5, 1988, the Honorable Byron R. White extended the time within which to file a petition for writ of certiorari to and including January 12, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Indian Department Appropriations Act of 1897, ch. 3, 30 Stat. 62, 83; Sections 14 and 28 of the Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495, at 500 and 504-

505, respectively; Sections 3, sub-sections 2 and 3, and sections 13, 14, 20 & 21 of the Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267, at 270, 275, and 277-278 respectively; 68 O.S. 1981, §§301, 303, 304, 305, 306, 307, 308, 312, 315, 316, and 317(b); and 68 O.S. Supp. 1984, §§302, 302-1, and 302-2, Each of these statutes are reproduced at App. D, *infra*, 36a-74a.

STATEMENT OF THE CASE

A. NATURE OF THE CONTROVERSY

This case is one of three parallel cases which present questions regarding state, federal, and/or tribal jurisdiction in criminal and civil matters involving Indians in the former "Indian territory", currently within the State of Oklahoma, (specifically, lands

allotted to the Five Civilized Tribes). The other two cases are Hodel v. Muscogee (Creek) Nation, No. 87-5377, in which the United States District Court for the District of Columbia rendered a decision on July 15, 1988, which is currently pending before this Court on a Petition for Certiorari filed by the United States Department of Justice, Case No. 88,798; and State v. Klindt, No. S-84-781, which is currently still pending on rehearing before the Oklahoma Court of Criminal Appeals.[1]

Respondents are individual Delaware Indians who operate an Indian "smoke shop" upon lands which were part of an

[1]To the extent that the original decision issued by the Oklahoma Court of Criminal Appeals (App. B, at 19a-32a) found no evidence that Klindt was an "Indian" and, in fact, the record does not contain any such evidence, the State does not feel that a decision in the Klindt case will have any effect either on this case or the Hodel case.

original Creek allotment. The current owners of this allotment are subject to restrictions on the alienation of the land by federal law.

Both the State of Oklahoma and the United State have consistently taken the position that the State of Oklahoma has general civil and criminal jurisdiction over matters involving Indians on restricted Indian allotments within the former "Indian territory", including the allotment involved herein. The instant case squarely presents the question of the authority of the State of Oklahoma, if any, over Indians on restricted Indian allotments, specifically including, whether allotments to members of the Five Civilized Tribes were intended to be "Indian Country" within the meaning of 18 U.S.C. §1151(c). In the event that this

Court finds that these lands are "Indian Country", this case also presents the related question of whether a member of one Indian tribe can assert immunity from state laws for activities occurring upon lands originally allotted to and currently owned by members of a different Indian tribe.

B. THE PROCEEDINGS BELOW

Respondents, Chester Lee Brooks, a/k/a Achisson Amenshi, and Larry Joe Brooks, were charged in the District Court of Tulsa County with the misdemeanor offenses of Cigarette Tax Act violations. The information filed in the case alleged that on the 17th day of May, 1984, in Tulsa County, State of Oklahoma, the Respondents/Defendants unlawfully and wilfully failed to produce upon demand the records of Defendants' cigarette

business, and further did unlawfully and wilfully hinder and prevent the inspection of said records. Defendants were also charged with unlawfully and wilfully hindering and preventing the examination of the premises where cigarettes were stored, after demand was made by representatives of the Oklahoma Tax Commission that they be allowed to enter and inspect the premises, said acts being in violation of 68 O.S. 1981, §§315 and 317(b) (O.R. 19).

Defendants filed a Special Appearance and a Motion to Dismiss Cause for lack of jurisdiction and venue (O.R. 23-25). It was at this stage of the proceedings that the federal question first arose. Specifically, Defendants argued that the land upon which their "Smoke Shop" was located was "Indian Country" within the

meaning of 18 U.S.C. §1151(c). Petitioner, State of Oklahoma, hereinafter referred to as "State", argued that the land in question was not "Indian Country" within the meaning of 18 U.S.C. §1151(c) (O.R. 28-72).

In support of it's position, the State relied primarily upon *Ex Parte Nowabbi*, 61 P.2d 1139 (Okl.Cr. 1936), and the federal statutes which had been interpreted therein. In addition, the State relied upon a decision in *State v. Klindt*[2] (App. E, at 75a-122a) issued by another Tulsa County Special Judge which held that the State had jurisdiction over alleged crimes occurring on a restricted

[2]This is the decision in the companion case referred to above, Case No. S-84-781, which is still pending on rehearing before the Oklahoma Court of Criminal Appeals.

Cherokee allotment that was leased to the Delaware tribe.[3]

Further, the State argued that the Defendants did not have the status of tribal members on the land in question, since the land was allotted to and owned by the original Creek Indian allottee, while the Defendants were members of the Delaware Tribe (O.R. 28-72, and 79-83). Thus, the State asserted that the Defendants did not have standing to raise the issue of "Indian Country".

On October 22, 1984, the Special District Judge assigned to the case held that the land in question was "Indian Country" and that the Defendants were

[3]Subsequent to its reliance on the decision in Klindt, the District Court reversed the special judge's decision and held that the State did not have jurisdiction. On appeal, the Court of Criminal Appeals' original decision remanded the Klindt case for further proceedings (App. B, at 19a-32a). On July 26, 1988, however, that opinion was withdrawn (App. C at 33a-35a) and, as stated previously, no opinion has yet been issued on rehearing.

members of the Delaware Tribe of Indians, although not listed on Delaware Tribal Rolls. As a result, the court held that it had no jurisdiction to consider allegations of criminal conduct against the Indian Defendants, thereby dismissing the case. A written order was filed on November 9, 1984 (O.R. 87-88) (App. F, at 123a-125a).

Thereafter, the State timely perfected an appeal to the Oklahoma Court of Criminal Appeals. On November 7, 1986, the Oklahoma Court of Criminal Appeals issued a decision affirming the lower court's decision. This original opinion expressly overruled *Ex Parte Nowabbi, supra,* and held that the subject tract of land was "Indian Country" within the meaning of 18 U.S.C. §1151(c), (App.

B, at 19a-32a) over which the State lacked jurisdiction.[4]

Thereafter, the State timely filed a Petition for Rehearing in the Oklahoma Court of Criminal Appeals and the United States Department of Justice was granted leave to file an *amicus curiae* brief. Both the State and the Department of Justice urged the Court on rehearing to hold that the land in question was not intended to be "Indian Country" within the definition of 18 U.S.C. §1151(c).

On July 26, 1988, the Oklahoma court withdrew its opinion of November 7, 1986, (App. C, at 33a-35a) and ordered that the consolidated cases *(Brooks and Klindt)* would, thereafter, be dealt with in separate

[4]This original opinion, issued November 7, 1986, consolidated this case with State v. Klindt, referred to herein.

opinions.[5] Then, on October 12, 1988, the Court, without even addressing the threshold question regarding whether the land was "Indian Country", pursuant to 18 U.S.C. §1151(c), issued its decision in *Brooks*, holding:

> "... the State of Oklahoma did not have the power to prosecute and the district court did not have jurisdiction to adjudicate this controversy." (App. A, at 1a-18a)[6]

The State of Oklahoma urges this Court to review that decision and to find that the land in question was not intended to be "Indian Country" within the definition of 18 U.S.C. §1151(c) and, therefore, the

[5]The major differences in Brooks and Klindt are discussed in the November 7, 1986 decision. (App. B, at 19a-32a)

[6]The dissenting opinion, although not indicating whether "Indian Country" still exists in relation to allotments of the Five Civilized Tribes, would hold that the Defendants were not entitled to any consideration for immunity from prosecution since they were not members of the same tribe as the one to whom the allotment was issued.

State of Oklahoma has both civil and criminal jurisdiction over all the activities occurring upon allotments in the former "Indian Territory" allotted to members of the Five Civilized Tribes.

REASONS FOR GRANTING THE PETITION

The Oklahoma Court of Criminal Appeals erred by implicitly holding that a Creek Indian allotment located in the former "Indian Territory" and leased by a Delaware Indian for the purpose of operating an Indian "smoke shop" was "Indian Country" within the meaning of 18 U.S.C. §1151(c). That holding affects jurisdiction over a substantial amount of land allotted to members of the Five Civilized Tribes which are still owned by the original allottee and/or their heirs, in Northeastern Oklahoma (formerly known

as "Indian Territory"); lands over which the State has exercised jurisdiction for more than eighty (80) years. Moreover, the question presented herein must be considered in light of *Hodel v. Muscogee (Creek) Nation*, Case No. 87-5377, filed July 15, 1988, currently pending on a Petition for Certiorari before this Honorable Court, Case No. 88,798. This is especially true where federal statutes have expressly divested the Cherokee and Creek tribes of the authority to establish tribal courts. In light of the important questions of federal law presented by this case which have not been, but should be settled by this Court[7], review by this Court is respectively requested.

[7]Rule 17.1(c) of the Rules of the Supreme Court, 28 U.S.C.A.

PROPOSITION I

THE OKLAHOMA COURT OF CRIMINAL APPEALS' DECISION TOTALLY IGNORES LEGISLATION RELATING TO THE FIVE CIVILIZED TRIBES. IN ADDITION, THE COURT'S DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT RELATING TO INDIANS IN THE FORMER "INDIAN TERRITORY".

Title 18 U.S.C. §1151 defines "Indian Country", in pertinent part, as follows:

> "Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian Country', as used in this chapter, means
> (a) *****
> (b) *****
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

In *Worcester v. Georgia*, 31 U.S. 515, 8 L.Ed. 483 (1832), this Court held that an Indian reservation "...is a distinct community, occupying its own territory,

with boundaries accurately described, in which... [state laws] can have no force..." *Id.*, at U.S. 561, L.Ed. 501. Then in *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 63 S.Ct. 1284, 87 L.Ed. 1612 (1943), this Court, in citing *Worcester*, said the theory behind the holding in *Worcester* was that

> "...the Indian tribes were separate political entities with all the rights of independent status--a condition which has not existed for many years in Oklahoma..." *Id.*, at U.S. 602, S.Ct. 1286, L.Ed. 1616. (Emphasis added.)

This Court even went further in describing the jurisdictional differences in Oklahoma stating:

> "The underlying principles on which [Indian] decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy

> as in Worcester v. Georgia, 6 Pet (US) 515, 8 L ed 483, supra; and, unlike the Indians involved in Kansas Indians case, 5 Wall. (US) 737, 18 1 ed 667, supra, they are actually citizens of the State with little to distinquish them from all other citizens except for their limited restrictions and their tax exemptions." *Id.*

See also, *Morton v. Ruiz*, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974), in which this Court treated Indians in Alaska and Oklahoma differently than reservation Indians in other states. Additionally, in *United States v. Hester*, 137 F.2d 145 (10th Cir. 1943), the Tenth Circuit Court of Appeals held that Oklahoma has, since statehood, had complete civil and criminal jurisdiction over all citizens residing within the state.

Finally, in *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, ___ U.S. ____, 106 S.Ct. 2305, 2311, 90 L.Ed.2d 881 (1986), this Court held that disclaimers of jurisdiction lawfully acquired by a State could not be reconciled with the congressional plan embodied in Pub.L. 280 and therefore, such disclaimers of jurisdiction were pre-empted by Pub.L. 280. In light of the holding in *Wold*, Petitioner asserts that where Congress has expressly and unequivocally conferred jurisdiction over individual Indians residing within a State to the courts of that State, a revocation of that jurisdiction must be equally unequivocal. Although Congressional enactments and legislative history clearly establish that Congress

intended to confer jurisdiction over individual Indians residing within the former "Indian Territory" upon the State of Oklahoma, no express Congressional revocation of jurisdiction from the State of Oklahoma has ever occurred.

A. HISTORY OF INDIANS IN OKLAHOMA

In order to fully understand Petitioner's position, a brief history of the Five Civilized Tribes, and specifically of the Creek Nation is essential.[8] Following the Indian Removal Act of 1830, the Five Civilized Tribes (Creek, Cherokee, Seminole, Choctaw, and Chickasaw) came to Oklahoma. *Harjo v.*

[8]It should be noted that Petitioner has detailed Creek history more extensively due to the fact that the alleged crimes occurred on an original Creek allotment. The history of the Cherokee Indians, from which Delaware Indians received all allotments, is substantially identical to the history of the Creeks, and in fact, most of the statutes cited herein apply to both the Creek and Cherokee Indians as well as the Seminole, Choctaw, and Chickasaw tribes.

Kleppe, 420 F.Supp. 1110, 1119 (D.C. Cir. 1976), affirmed in *Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). Prior to the Civil War, these tribes owned all of the present State of Oklahoma except the panhandle region. *Id.* Due to their alliance with the confederacy, however, they were penalized by forced cession of their western lands to the federal government. *Id.* The remaining lands occupied by these tribes came to be known as "Indian Territory". *Id.* See also *Marlin v. Lewallen*, 276 U.S. 59, 48 S.Ct. 248, 72 L.Ed. 467 (1928).

For years, the Creeks maintained their own government, with executive, legislative and judicial branches. According to this Court, in *Marlin v.*

Lewallen, *supra*, the Creeks occupied, within Indian Territory, a large district which belonged to the tribe as a community, rather than to members severally or as tenants in common. The Creeks were under the guardianship of the United States and with territory over which it had plenary jurisdiction, thereby allowing the exercise of full control over the Creeks and their district whenever Congress perceived a need thereof. Originally and for a long period of time, the United States basically refrained from exerting its power or control, leaving a lot to the tribal governments. In time, however, the tribes came to be surrounded by a large and increasing white population, many of the whites entering the Creeks' district and living there.

A recurring problem in the relations between the Creeks and the whites at this time was the general absence of an adequate court system to deal with criminal and civil disputes. The Creek courts did not have jurisdiction over whites, and federal courts in the area were established very slowly. Accordingly, crime flourished and the payment of debts was unenforceable. As a result, the United States began to perceive a need for making a larger use of its power. *Marlin v. Lewallen, supra.* See also *Harjo v. Kleppe, supra,* at 1121.

In 1889, in an effort to relieve these problems, Congress established a special court for the Indian Territory which was given jurisdiction of many offenses against the United States and of

certain civil cases where not solely between persons of Indian blood. Act of March 1, 1889, ch. 333, 25 Stat. 783. Thereafter, on May 2, 1890, Congress passed an act which provided for a temporary government for the Territory of Oklahoma and enlarged the jurisdiction of the United States Court in the Indian Territory. 26 Stat. 81. Sections 29-31 of this Act enlarged the jurisdiction of the district courts for the 'Indian Territory' and several statutes of the State of Arkansas were put in force so far as not locally inapplicable or in conflict with other laws of congress. These provisions were restricted, however, to the effect that the courts of each tribe were to retain exclusive jurisdiction of all cases which involved only members of the tribe, and the

adopted Statutes of Arkansas did not apply to such cases. 26 Stat. 81, §30.

In 1893, Congress created the Dawes Commission for the purpose of conducting negotiations with each of the Five Civilized Tribes concerning allotment of their lands among their members, disposal of any lands remaining after allotment and for further adjustments necessary to the dissolution of these tribes. 27 Stat. 645. During the next several years, the Dawes Commission attempted to negotiate the dissolution of the tribes. By 1895, however, the tribes still refused to deal with this Commission. As a result, Congress authorized the survey of all Indian land and directed the Commission to make a complete roll of the members of each of the tribes. Additionally, bills were introduced

calling for the forcible abolition of tribal status. Congress began in the 1897 Appropriations Act, 30 Stat. 62, to force the issue by subjecting all laws passed by the National Council, except resolutions of adjournment and acts relating to negotiations with the Dawes Commission, to Presidential veto. As a result of these pressures, the tribes began to deal with the Commission. *Harjo v. Kleppe, supra*, at 1122.

Thereafter, on June 7, 1897, Congress passed an act, 30 Stat. 83, (App. D, at 36a-37a) which provides, in pertinent part, as follows:

> "...that on and after January first, eighteen hundred and ninety-eight, the United States Courts in [the Indian] Territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted and all criminal

> causes for the punishment of any offense committed after January first, eighteen hundred and ninety-eight, by any person in said Territory, * * * ; and the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes; and any citizen of any one of [the Five Civilized] tribes otherwise qualified who can speak and understand the English language may serve as a juror in any of said courts." (Emphasis added.)

As a direct result of this Act federal (territorial) courts in India Territory, i.e., the Eastern one-half o the present State of Oklahoma, were give original and exclusive jurisdiction t try all civil causes instituted after th passage of the Act and all crimina causes for any offenses committed afte January 1, 1898. The jurisdiction o these federal courts extended to bot

Indians and non-Indians.

Finally, on June 28, 1898, Congress forbade the enforcement of tribal laws and the tribal courts were abolished. 30 Stat. 495, (App. D, at 37a). See also *Harjo v. Kleppe, supra.* In *Marlin v. Lewallen, supra,* at 72 L.Ed. at 468, this Court made the following statement regarding the evolution of these congressional acts:

> "Thus the congressional enactments gradually came to the point where they displaced the tribal laws and put in force in the territory a body of laws adopted from the Statutes of Arkansas and intended to reach Indians as well as white persons, except as they might be inapplicable in particular situations, or might be superseded as to any of the five civilized tribes by future agreements." (Emphasis added.)

In 1900 the Dawes Commission succeeded in negotiating an agreement with the Creek Tribe as had been

contemplated by the Acts of March 3, 1893, 27 Stat. 645 and June 7, 1897, 30 Stat. 83. During these negotiations, the Creeks demanded protection and preservation of their courts. The agreement, as ratified by Congress, however, known as the Original Creek Agreement, contained the following provision continuing the abolishment of the Creek courts:

> "47. Nothing contained in this agreement shall be construed to revive or reestablish the Creek courts which have been abolished by former Acts of Congress." 31 Stat. 861; ratified by the Creek National Council on May 25, 1901; proclaimed law by President William McKinney on June 25, 1901.

A modifying agreement, known as the Supplemental Creek Agreement, was thereafter negotiated. This agreement was ratified by Congress on June 30,

1902, 32 Stat. 500. The Supplemental Agreement did not, however, contain any provisions which would have revived the Creek courts.

Pursuant to an Act of April 26, 1906, 34 Stat. 137, the membership rolls of all of the Five Civilized Tribes were to be closed; provisions were made "for the final disposition of the affairs of the Five Civilized Tribes in Indian Territory"; the authority of the tribal governments to tax was abolished; and provision was made for the "dissolution of the tribal governments" upon the completion of the allotment process and the sale of unallotted tribal lands.

Finally, it should be pointed out that an act of May 8, 1906, provided in part, as follows:

> "...each and every allottee shall have the benefit of and be

> subject to the laws, both civil and criminal, of the State or Territory in which they may reside;..." 34 Stat. 182.

The final proviso of this Act, however, provided:

> "That the provisions of this act shall not extend to any Indians in the former Indian Territory."

To the extent that the Act of June 7, 1897, 30 Stat. 83, quoted above, had already extended the laws of the State of Arkansas to all persons within the Indian Territory, the only explanation for this provision is that Congress intended to take the Indians in the Indian Territory out of the category of Reservation Indians. To the extent Congress had already limited the jurisdiction of the United States over allotments in the former "Indian Territory", no additional legislation was deemed necessary to

accomplish this result. Accordingly, the final proviso of the Act of May 8, 1906, only reiterates Congress' perception of its earlier legislation, discussed herein, in relation to Indians in the former "Indian Territory".

B. OKLAHOMA HAS ACQUIRED COMPLETE JURISDICTION OVER LANDS ALLOTTED TO MEMBERS OF THE FIVE CIVILIZED TRIBES IN THE FORMER "INDIAN TERRITORY".

The relevant legislative history, discussed in IA *infra*, leaves no doubt that Congress' intent was to make Oklahoma Indians subject to the civil and criminal laws of the state of Oklahoma. In fact, in *United States v. Hester, supra*, the Tenth Circuit Court of Appeals stated:

> "...It is pertinent to remember that the sovereign State of Oklahoma has plenary power to tax all property within its domain, unless specifically restrained by force of Federal law. Indians residing in Oklahoma are citizens of that State, and they are

> amendable to its civil and criminal laws. Their property, unless exempt, is subject to taxation in the same manner as property belonging to other citizens of that State. Matter of Heff, 197 U.S. 488, 25 S.Ct. 506, 49 L.Ed. 848; Goudy v. Meath, 203 U.S. 146, 27 S.Ct. 48, 51 L.Ed. 130." *Id.*, at 147. (Emphasis added.)

Moreover, in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983), this Court held:

> "It should be obvious that, to the extent that a claimed bar to state jurisdiction in these cases is premised on the respective state Constitutions, that is a question of state law over which the state courts have binding authority..." *Id.*, at S.Ct. 3210.

The Enabling Act which made provision for the entrance of the State of Oklahoma into the Union, 34 Stat. 267, contained two specific references to the lands of

the Indians comprising the new state. Sections 1 and 3 of the Enabling Act, state in pertinent part:

> "Section 1 ...*Provided*, That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or effect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed. (Emphasis added.)
>
> * * *
>
> "Section 3 ...That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land

> shall have been extinguished by the United States the same shall be and remain subject to the jurisdiction, disposal, and control of the United States." (Emphasis added.)[9]

The above-quoted language i virtually identical to Article 1, §3 o the Oklahoma Constitution which states in pertinent part:

> "The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public lands shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States..." (Emphasis added.)

[9]It is significant that Oklahoma's Enabling Act only gave jurisdiction to "public lands". In other states the disclaim language contains disclaimers to not only "public lands", but al to lands owned or held by Indians or Indian tribes. See Appendix at 126a-144a, Constitutions of Wyoming, New Mexico, Arizona, Montan South Dakota, Washington and North Dakota.

The Oklahoma Enabling Act also provided that the State courts were to be the successor to the territorial courts, except in specified situations which were to be transferred to the federal court system. *Ibid.*, §§16, 19, 20.

The Oklahoma Supreme Court has, on several occasions, considered the effect of, the disclaimer language in Oklahoma's constitution. Consistently, they have held that Oklahoma only disclaimed its proprietary interest in Indian lands. *State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77, 87 (Okl. 1985); *Ahboah v. Housing Authority of Kiowa Tribe*, 660 P.2d 625, 630 (Okl. 1983); *Curry v. Corporation Commission*, 617 P.2d 177, 182 (Okl. 1980), *cert. denied* 452 U.S. 938, 101 S.Ct. 3080, 69

L.Ed. 2d 952 (1981) *reh. denied* 453 U.S 927, 102 S.Ct. 890, 69 L.Ed.2d 102 (1981)[10]. See also, *Organized Village of Kake v. Egan*, 369 U.S. 60, 69-70, 82 S.Ct. 562 567-568, 7 L.Ed.2d 573 (1962), in whic this Court considers congressiona discussions at time of the Alask Statehood Act in finding that there wa no intent to disclaim State "political c police power with respect to the action of people on...[Indian] land, as long a that does not affect the title to th land." Such a disclaimer was disclaimer of proprietary interests only

It is clear that Congress intende for Oklahoma, upon statehood, to acquir complete civil and criminal jurisdictio

[10]The Oklahoma Court of Criminal Appeals has never express disagreed with the position taken by the Oklahoma Supreme Court this point of state law.

over all citizens residing within said state, irrespective of race. *United States v. Hester, supra.* Further, no subsequent enactment by Congress has expressly revoked the State's lawfully acquired jurisdiction.

In fact, the legislative history of the Oklahoma Indian Welfare Act (OIWA) of June 26, 1936, ch. 831, 49 Stat. 1967 (codified as amended at 25 U.S.C. §§501-509 [1982]), makes it clear that Congress did not, by enacting the OIWA, intend to confer law enforcement authority in excess of those already possessed by Oklahoma tribes. The legislative history surrounding the enactment of the OIWA explains why congress exempted Oklahoma tribes from the operation of the Indian Reorganization Act. The following is an

excerpt from the legislative history of the OIWA:

> "During the last session of Congress a bill known as the "Wheeler-Howard Act" [The Indian Reorganization Act] was passed proposing new legislation for the Indian citizens of the entire United States. . . In Oklahoma the several Indian reservations have been divided up, the Indians having first chance at the selection of allotments or farms. After the Indians were allotted lands of their selection, the balance of the several reservations were divided up into farms and disposed of to white settlers; hence, as a result of this program, all Indian reservations as such have ceased to exist and the Indian citizen has taken his place on an allotment or farm and is assuming his rightful position among the citizenship of the State.
>
> Under the Oklahoma constitution and our laws, all Indians are full citizens and enjoy all the rights extended white citizens. The Wheeler-Howard bill was evidently prepared having in view the large Indian reservations located in the western and southwestern States. The Oklahoma Indians having made progress beyond the reservation

plan, it was thought best not to encourage a return to reservation life.

Inasmuch as the Indians of Oklahoma present many and varied problems, special consideration has been given to such State and as the result of such study, Senate Bill 2047 was prepared and is now pending before the Congress for consideration.

S.Rep.No. 1232, 74th Cong. 1st Sess. 6 (1935). (Emphasis added.)

A review of this legislative history and the circumstances surrounding the passage of the Indian Reorganization Act and the OIWA make it clear why separate legislation was drafted for Oklahoma. As discussed previously, Congress at least perceived a difference in the legal status of Oklahoma and therefore, they attempted (by drafting special legislation to allow tribes in Oklahoma to reorganize for their common welfare)

not to alter their legal status. Allowing a tribe to reorganize for its common welfare under 25 U.S.C. §503, only conferred limited powers upon the tribe, including the right to determine tribal membership, the right to elect a tribal government, and the right to dispose of tribal assets. Any additional powers available to reorganized tribes are only available to corporate bodies recognized by the Secretary of Interior. See 25 U.S.C. §503.

The constitution adopted by the Creeks in 1979 does not contain any broad police and judicial powers. See Cohen, *Handbook of Federal Indian Law*, 455 (1942 ed.) Further, since Federal statutes are, pursuant to Article VI of the United States Constitution, the supreme law of

the land, the Constitution of the Creek Nation cannot repeal or modify the Curtis Act. Finally, the Department of Interior cannot, by approving the Creek Nation's Constitution confer greater powers on the tribe than Congress saw fit to do. *Matheson v. Kinnear*, 393 F.Supp. 1025, 1029 (W.D. Wash. 1975).

Instead of expressly revoking the jurisdiction lawfully acquired by the State of Oklahoma over Indians within the former "Indian Territory", Congress has gone further in attempting to assimilate members of other Indian tribes into society by enacting legislation such as Pub.L.280 in order to encourage other states to assume jurisdiction over Indians within their individual state borders similar to the jurisdiction

conferred upon the State of Oklahoma at statehood.[11]

In light of the federal legislative enactments relating specifically to the Five Civilized Tribes, discussed herein, as well as federal legislation encouraging states to assume jurisdiction over other Indian tribes, it becomes clear that Congress conferred complete jurisdiction over Indians within the former "Indian Territory" upon the State of Oklahoma at statehood and that Congress did not intend to include allotments of the Five Civilized Tribes within the definition of "Indian

[11]Pub.L.280 was designed solely to extend the jurisdiction of those States who had not already lawfully acquired such jurisdiction. Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, et al, supra. Since Oklahoma acquired jurisdiction over lands allotted to members of the Five Civilized Tribes in the former "Indian Territory", Oklahoma did not need to take any action under Pub.L.280 in order to continue to exercise such jurisdiction.

Country", codified at 18 U.S.C. §1151(c). To hold otherwise would implicitly repeal all of the legislation specifically enacted by Congress relating to the Five Civilized Tribes.[12]

Even assuming arguendo that Congress intended to include allotments of the Five Civilized Tribes within the definition of "Indian Country", Indians who are not members of the alloting tribe should not be entitled to immunity from state prosecution for their activities conducted on another Tribes allotted lands. *Compare, Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). In

[12]Repeals by implication are not, however, favored. Rodriguez v. U.S., 107 S.Ct. 1391, 94 L.Ed.2d 533 (1987); Andrus v. Glover Const. Co., 100 S.Ct. 1905, 446 U.S. 608, 64 L.Ed.2d 548 (1980); and U.S. v. Barrett, 837 F.2d 933 (10th Cir. 1988).

fact, such an extension of immunity from state prosecution would return Oklahoma to the state of lawlessness which Congress attempted to alleviate as early as 1889; neither the State nor the Creek Nation would have jurisdiction over non-Creek Indians engaging in activities upon lands allotted by the Creek Nation. Further, the federal courts are not equipped to handle the increase in crime which will result upon lands not heretofore recognized as "Indian Country".

CONCLUSION

For the reasons stated, the State respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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I hereby certify that on the 10th day of January, 1989, I mailed a true and correct copy of the above and foregoing Petition for a Writ of Certiorari to:

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M. DENISE GRAHAM

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

STATE OF OKLAHOMA,

Petitioner,

vs.

CHESTER LEE BROOKS, A/K/A
ACHISSON AMENSHI AND
LARRY JOE BROOKS

Respondents.

APPENDIXES TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

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APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, APPELLANT,

v.

CHESTER LEE BROOKS,
A/K/A ACHISSON AMENSHI,
AND LARRY JOE BROOKS, APPELLEES.

No. S-85-117.

October 14, 1988.

OPINION ON REHEARING

BRETT, Presiding Judge.

Appellants, Chester Lee Brooks, a/k/a Achisson Amenshi, and Larry Joe Brooks, were charged in Tulsa County District Court, Case No. CRM-84-1026, with violating sections of the Cigarette Tax Act. Specifically, they were charged

with willfully failing to produce required cigarette sales records, hindering or preventing the inspection of such records, and hindering or preventing the examination of their store in which cigarettes were kept. These acts constitute misdemeanor violations of Title 68 O.S. 1981, § 315, and are punishable by twelve months' imprisonment in the county jail, or a fine not to exceed five hundred dollars ($500.00), or both. *See* 68 O.S. 1981, §317(b).

The State filed informations against appellees in district court. Appellees then filed a motion to dismiss the charges, claiming that the land on which the alleged offenses occurred is "Indian Country" (*see* 18 U.S.C. 1151 (c)) over which there is no state jurisdiction.

(O.R. 23-25) In accordance with the appellees' arguments, the trial judge ordered the cause dismissed. The trial judge's order was affirmed by Special District Judge Gordon McCallister. 22 O.S. 1981, Ch. 18, App. Rule 6.2, Rules of the Court of Criminal Appeals. (O.R. 87-88) This case was then brought before this Court on the narrow question of whether the lower court properly dismissed for lack of jurisdiction the charges against appellees, (*see* 22 O.S. 1981, Ch. 18, App. Rule 6.1, Rules of the Court of Criminal Appeals), and we affirmed the lower court's ruling. That opinion, rendered on November 7, 1986, was vacated by order on July 26, 1988, and this opinion on rehearing is delivered.

Appellees are members of the Delaware Tribe of Indians who leased some property from members of the Creek Indian Nation and operated a cigarette store or "smoke shop" thereon. On May 11, 1984, agents of the Oklahoma State Tax Commission went to appellees' smoke shop to seize unstamped cigarettes and tobacco products. One of the agents, Rick Cleary, went into the shop and purchased a carton of cigarettes on which no statutorily required Oklahoma Tax stamps were affixed. *See* 68 O.S.Supp. 1984, §302. Appellees did not inquire into his status as an Indian or non-Indian prior to making the sale. Later, the other agent, Gertie Rogers, identified herself as an agent of the Oklahoma Tax Commission and requested to enter the

store pursuant to her authority under 68 O.S. 1981, §315. The attendant on duty locked the front door and refused to admit her. He told her not to return without a Federal Marshall because the land was Indian land over which the State had no jurisdiction. (O.R. 4, 5).

On May 16, Ms. Rogers signed an affidavit supporting a warrant to search appellee's establishment for unstamped cigarettes and tobacco products, and records of purchases and sales of these items. The next day, Deputy R.D. McAtee accompanied these agents to the smoke shop and attempted to execute the warrant. Appellees refused to comply and were subsequently arrested.

The sole issue before this Court is whether the district court had jurisdiction to enforce certain record

keeping and inspection provisions of Oklahoma's Cigarette Tax Act against Indians (appellees) who sold cigarettes from an establishment located on Indian lands. Appellees' argument, both at the lower court level and on appeal, is that because they are Indians, and the land in question is Indian Country, they are absolutely shielded from state court jurisdiction under the doctrine of "sovereign immunity." This argument, however, fails to consider the fact that in this unique area of state taxation of Indian cigarette sales, the United States Supreme Court has authorized both state imposition of taxes on sales to non- and off-reservation Indians, and state imposition of certain recordkeeping requirements designed to keep track of those sales -- regardless of whether

sovereign immunity would, under different circumstances, provide an absolute defense to such regulation. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155, 100 S.Ct. 2069, 2082, 65 L.Ed.2d 10 (1080). According to *Colville*, neither appellants' status as Indians, nor the status of their land as Indian Country pursuant to 18 U.S.C §1151(c), would provide them with a sovereign immunity "shield" from state regulation. Therefore, because the existence or non-existence of appellants' sovereign immunity is irrelevant to the determination of the particular issue at hand, we do not now address it. Instead, our focus will be on what we feel is the dispositive issue: whether the United States Supreme Court cases, which

sanction the imposition of state tax an
recordkeeping requirements on Indians o
Indian Country who sell cigarettes t
non- or off-reservation Indians, provid
grounds for the state court prosecutio
of the charges in this case.

The United States Supreme Court ha
clearly espoused its view of states
attempts to impose their taxes o
Indians:

> [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. Arizona State Tax Commission*, [411 U.S. 164, 93 S.Ct 1257, 36 L.Ed.2d 129 (1973)], lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional

consent.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed2d 1114 (1973). Thus, "[i]n the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule [against such a practice]." *California v. Cabazon Band of Mission Indians*, ___ U.S. ___, ___, 107 S.Ct. 1083, 1091 n. 17, 94 L.Ed.2d 244 (1987) (emphasis in original). These cases were never intended, however, to establish "an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent." *Id.* at ____, 107 S.Ct. at 1091 (emphasis added). In fact, "under certain circumstances a State may validly assert authority over the

activities of nonmembers on
reservation... and... in exceptiona
circumstances a State may asser
jurisdiction over the on-reservatio
activities of tribal members." *New Mexic*
v. Mescalero Apache Tribe, 462 U.S. 324, 331-
332, 103 S.Ct. 2378, 2385, 76 L.Ed.2d 61
(1983). Examples of those situations i
which a state would be authorized t
assert jurisdiction over otherwise immun
tribal activities are found in *Moe*
Confederated Salish and Kootenai Tribes, 425 U.S
463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976
and *Washington v. Confederated Tribes of the Colvil*
Indian Reservation, 447 U.S. 134, 100 S.Ct
2069, 65 L.Ed.2d 10 (1980). See *Cabazon*
____ U.S. at ____, 107 S.Ct. at 1091.

In both *Moe* and *Colville* the Supreme Court held that a State can, even in the absence of congressional consent, "require tribal smokeshops on Indian reservations to collect state sales tax from their non-Indian customers." See *Cabazon*, ____ U.S. at ____, 107 S.Ct. at 1092. When the issue is whether an Indian selling cigarettes from a store on Indian land is subject to state regulation of their sales to non-Indians, traditional obstacles to state jurisdiction and control are simply not pertinent: "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would

normally do their business elsewhere *Colville*, 447 U.S. at 155, 100 S.Ct. 2082. *See also The Citizen Band Pottawatomie Indi Tribe of Oklahoma v. The Oklahoma Tax Commissio* No. CIV-87-0338-W, Order of April (W.D.Okla. 1988). Consequently, even the lands at issue in the case at bar m the definition of Indian Country under U.S.C. 1151(c), and appellants were according to current law, found to Indians, these facts would n automatically preclude stat jurisdiction. According to the Court "[w]hat the smoke shops offer thes customers, and what is not availab elsewhere, is solely an exemption fr state taxation." *Id.* "[I]f a State tax is valid, the State may impose least minimal burdens on Indi

businesses to aid in collecting and enforcing that tax." *Id.*, 447 U.S. at 159, 100 S.Ct. at 2084.

The United States Supreme Court has thus granted to States the authority both to tax and to impose certain record keeping requirements on Indians in Indian Country, regarding their sales of cigarettes to non- or off-reservation Indians. *See Colville*, 447 U.S. at 161, 100 S.Ct. at 2085.[1] While we believe that implicit in this grant of authority is the concomitant power of enforcement through the sate court system (*see also Citizen Band Pottawatomie*) -- which power the State was attempting to exercise in the instant case -- such authority is not

[1] An example of a valid record keeping scheme can be found in Colville, 447 U.S. at 159, 100 S.Ct. at 2084.

unconditional. Because the information in this case did not relate specifically to appellees' cigarette sales to non-Indians or off-reservation Indians, and thus did not meet the United States Supreme Court prerequisite to the exercise of state tax authority over Indians on Indian land, we hold that the State of Oklahoma did not have the power to prosecute and the district court did not have jurisdiction to adjudicate this controversy. Whether these charges, if addressed solely to appellees' sales to non-Indians and off-reservation Indians, would be considered valid under current United States Supreme Court precedent is not before this Court.

For the foregoing reasons, Case No. CRM-84-1026 is AFFIRMED.

A Rule VI appeal by the State, by and

through the District Attorney of Tulsa County, from an order of the Honorable Gordon D. McCallister, Special Judge, dismissing for want of jurisdiction a violation of the Cigarette Tax Act in Tulsa County District Court, Case. No. CRM-84-1026. The Court of Criminal Appeals **AFFIRMS.**

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OPINION BY: BRETT, P.J.
BUSSEY, J.: DISSENTS
PARKS, J. : CONCURS

BUSSEY, J., DISSENTING:

I dissent. Even if the Creek allotment in this case were Indian Country, *c.f. Ex Parte Nowabbi*, 60 Okl.Cr. 111, 61 P.2d 1139 (1936),[1] I do not believe that the defendants in this case are entitled to any consideration for immunity from prosecution. They are Delaware Indians who leased a Creek

[1]The Oklahoma Supreme Court has disapproved and withdrawn this case in part. State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma, 711 P.2d 77 (Okla.1985). To the extent that Nowabbi may be construed to prevent lands in what was formerly Indian Territory which were allotted to tribes other than the Five Civilized Tribes from coming within the federal definition of Indian Country, I agree that the opinion was overly broad. However, this case involves land allotted to the Creek Tribe, which was among the Five Civilized Tribes.

Tribal allotment to operate a public business. The Supreme Court has determined that Indians who reside on a reservation but are not enrolled in the governing Tribe are not immune from taxation by the States. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). If Indians in that situation are not immune from direct taxation by the State, I perceive no basis to consider immunity for these defendants who are not enrolled as members of the Creek Tribe. Furthermore, the State is not even trying to collect taxes from Indians. Rather, it is simply attempting to enforce its right to review records which it may require Indians to keep, even if those Indians are immune

from taxation. *Ibid.*

The majority holds that, "Because t
charges in this case did not rel
specifically to appellees' cigare
sales to non-Indians or off-reservat
Indians, *and thus did not meet the United St*
Supreme Court prerequisite to the exercise of state
authority over Indians on Indian land," (empha
added) the State lacked jurisdicti
Aside from the fact that the Supr
Court has not announced t
"prerequisite" on which this hold
turns, the defendants in this case co
not have claimed immunity f
prosecution in any event. T
information filed in this case reci
sufficient facts to state a crime un
Oklahoma law, and I would reverse t
decision of the District Court.

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

No. S-85-117

THE STATE OF OKLAHOMA, APPELLANT

v.

CHESTER LEE BROOKS,
A/K/A ACHISSON AMENSHI,
AND LARRY JOE BROOKS, APPELLEES

No. S-84-781

THE STATE OF OKLAHOMA, APPELLANT

v.

DICK EARL KLINDT, APPELLEE

OPINION

BRETT, Judge:

The above-numbered cases are consolidated on appeal because they

contain the same issue. That issue is whether the trial court abused its discretion in dismissing the causes for lack of state court jurisdiction. Although the State terms its appeal filed against Appellees Brooks and Amenshi a reserved question of law, we find that in substance it is a Rule VI appeal, and we have treated it accordingly.

Appellees Brooks and Amenshi were charged in Tulsa County Case No. CRM-84-1026 with Violation of Cigarette Tax Act. These Appellees operate a "smoke shop" on lands which are part of an original Creek allotment.

Appellee Klindt was charged in Tulsa County Case Nos. CRF-82-821 and CRM-82-538 with Assault with a Dangerous Weapon and Interfering with an Officer. These alleged offenses occurred at a "smoke

shop" operated by the Delaware Tribe. The land is leased by the Delaware Tribe from Agnes Tiblow Washington, a full-blood Cherokee Indian. The land is held in trust to the United States of America with a life estate reserved in Mrs. Washington. The land was part of an original allotment by the Cherokee Indian Nation to Mrs. Washington's mother, a full-blood Cherokee Indian. The land was part of an original allotment by the Cherokee Indian Nation to Mrs. Washington's mother, a full-blood Cherokee Indian.

Jurisdiction over Indian Country has been given to either the states or the federal government through statutes. The Act of August 15, 1953, Pub.L. No. 83-280, 67 Stat. 588 (1953) gives the states permission to assume criminal and civil

jurisdiction over any "Indian Country" within the borders of the state. Under this public law, Oklahoma could have, without the consent of the affected Indians, assumed jurisdiction over any Indian country in the state by Constitutional amendment. Because of Title IV of the Civil Rights Act of 1968, 25 U.S.C. §§ 1321-1326 (1970), however, the consent of the affected Indians is now required before a State is permitted to assume criminal and civil jurisdiction over "Indian Country". *See* 25 U.S.C. §§ 1321(a) and 1322(a) (1970); *State v. Littlechief*, 573 P.2d 263 (Okl.Cr. 1978). The State of Oklahoma has never acted pursuant to Public Law 83-280 or Title IV of the Civil Rights Act to assume jurisdiction over the "Indian Country"

within its borders. *See, C.M.G. v. State*, 594 P.2d 798 (Okl.Cr. 1979) *cert. denied*, 444 U.S. 992 (1979); *State v. Burnett*, 671 P.2d 1165 (Okl. Cr. 1983); *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okl. 1985). Accordingly, the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.

Both cases at bar were dismissed for lack of jurisdiction. These rulings were affirmed by a district court judge. Appellees Brooks and Amenshi challenged the court's jurisdiction at a pre-trial hearing. At that hearing appellees Brooks and Amenshi also proved that they were Indians, as required under Federal law, through their Tribal identification cards. These appellees are both Delaware

Indians.

Appellee Klindt challenged the tria court's jurisdiction before trial on hi felony charge. He had been bound ove for trial after a preliminary hearing There is no evidence in the record as t appellee Klindt's status as an Indian.

Appellee Klindt contends he has n affirmative duty to prove his status a an Indian, furthermore, that his statu as an Indian is not relevant to th outcome of this case. We disagree Proof of one's status as an Indian unde Federal Indian law is necessary befor one can claim exemption from prosecutio under state law. *Goforth v. State*, 664 P.2 114 (Okl. Cr. 1982). This is necessar because federal jurisdiction over crime committed in Indian Country does no

extend to crimes committed by non-Indians against non-Indians. *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869 (1882); *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978).

Appellee Klindt cites *State v. Burnett*, 671 P.2d 1165 as authority for this proposition. Although one of the defendants in *Burnett* was not an Indian, we align our holding in the instant case with the weight of authority holding that one's status as an Indian is a factor in determining jurisdiction. *See McBratney*, 104 U.S. at 621; *Wheeler*, 435 U.S. at 1087; *New York ex rel. Ray v. Martin*, 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261 (1946); *Draper v. United States*, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419 (1896); *Tooisgah v. United*

States, 186 F.2d 93 (10th Cir. 1950); *Norvell v. Sangre de Cristo Development Company, Inc.*, 372 F.Supp. 348 (D.N.M. 1974); *Goforth v. State*, 644 P.2d at 116; *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okl. 1985). Any portion of *State v. Burnett* inconsistent with this opinion is overruled.

We suggest that in future cases a defendant's status as an Indian be proved when he challenges the state court's jurisdiction. This procedure would save the court's time since proof of status as an Indian may be the sole factor for determination in a case similar to the one at bar.

We now turn to the question of whether the trial court abused its discretion in dismissing the causes against appellees for the lack of jurisdiction. The State

bases its arguments for jurisdiction on *Ex Paret [sic] Nowabbi*, 60 Okla. Crim. 111, 61 P.2d 1139 (1936). In *Nowabbi*, the court held that the state court had jurisdiction to prosecute a Choctaw Indian for murdering a Choctaw Indian on the victim's restricted allotment. *Id.* at 113. The court reached this result by concluding that a 1906 amendment to the General Allotment Act precluded Indian Country jurisdiction in the then-called Indian Territory which is now eastern Oklahoma. *Id.* at 150.

The holding in *Nowabbi* is inconsistent with the Oklahoma Supreme Court's holding in *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okl. 1985). In *Seneca-Cayuga*, the Court held that a tribal allotment to the

Quapaw and Seneca-Cayuga Tribes is India Country even though the land is locate in eastern Oklahoma. *Id.* at 82. Unde *Nowabbi* the land could not have bee "Indian Country" because the *Nowabbi* cour held that allotted lands which wer located in what had been "India Territory" before statehood were no "Indian Country" under federal law. 6 P.2d 1156. We resolve this inconsistenc in favor of the holding in *Seneca-Cayuga* There is ample evidence to indicate tha the *Nowabbi* court misinterpreted th statutes and cases upon which it base its opinion. *See* F. Cohen, Federa Handbook of Indian Law, 778 n.84 (198 ed). Furthermore, the 1948 Federa Indian Country statutes have attempted t

extinguish existing doubts in favor of federal jurisdiction in an attempt to make a uniform rule. 18 U.S.C. §§ 1151-1153 (1970). *See also United States v. John*, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978) (federal law applied to Choctaws in Mississippi); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 95 S.Ct. 1634, 48 L.Ed.2d 96 (1976) (existing state law superceded by federal statutes). *Nowabbi* is hereby overruled.

We have examined the record and find the trial court did not abuse its discretion in finding that the lands in question are Indian Country as defined by 18 U.S.C. §1151(c). Inasmuch as Appellees Brooks and Amenshi proved they were Indians, the trial court correctly ruled that it did not have jurisdiction.

Tulsa County Case No. CRM-84-1026 is therefore AFFIRMED.

Regarding Appellee Klindt, however, there is no record to indicate whether he is an Indian, a crucial factor in determining whether the state court had jurisdiction. If Klindt's status as an Indian was established, the record should be made to so reflect and the trial court's ruling shall be affirmed. If the trial court decided the jurisdictional issue without Klindt's establishing that he is an Indian, the trial court abused its discretion in dismissing the action. If that be the case, the order of dismissal shall be vacated and a proper determination made. If Klindt establishes that he is an Indian, the case shall then be dismissed. If no such showing is made, the case may be tried.

See State v. Durham 545 P.2d 805 (Okl.Cr. 1976). Tulsa County Case Nos. CRM-82-538 and CRF-82-821 are REMANDED with directions.

A Rule VI appeal by the State, by and through the District Attorney of Tulsa County, from an order of the Hon. Jay D. Dalton, District Judge, dismissing for want of jurisdiction charges of Assault with a Dangerous Weapon and Interfering with an Officer in Tulsa County District Court Case Nos. CRF-82-821, and CRM-82-538, respectively. The order reversed the decision by the Hon. John F. Reif, Special District Judge. The Court of Criminal Appeals REMANDS with directions.

A Rule VI appeal by the State, by and through the District Attorney of Tulsa County from an order of the Hon. Gordon D. McAllister, Special Judge, dismissing for want of jurisdiction a violation of the Cigarette Tax Act in Tulsa County District Court Case No. CRM-84-1026. The Court of Criminal Appeals AFFIRMS.

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OPINION BY BRETT, J.
PARKS, P.J., CONCURS
BUSSEY, J., CONCURS IN RESULTS

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. S-85-117

THE STATE OF OKLAHOMA, APPELLANT,

v.

CHESTER LEE BROOKS,
A/K/A ACHISSON AMENSHI,
AND LARRY JOE BROOKS, APPELLEES.

No. S-84-781

THE STATE OF OKLAHOMA, APPELLANT,

v.

DICK EARL KLINDT, APPELLEE.

ORDER GRANTING
PETITION FOR REHEARING
AND WITHDRAWING OPINION

On November 7, 1986, this Court rendered an opinion consolidating two

Rule VI appeals: State v. Klindt, S-84-781, and State v. Brooks, A/K/A Achisson Amenshi, and Larry Joe Brooks, S-85-117. Klindt was charged in Tulsa County District court, Cases CRF-82-821 and CRM-82-538, with Assault With a Dangerous Weapon (21 O.S. 1981, §645) and Interference With an Officer (21 O.S. 1981, §267). In a wholly unrelated case, Brooks and Amenshi were charged with Violation of Cigarette Tax Act (68 O.S. 1981, §§ 315 and 317(b)) in Tulsa County District Court, Case No. CRM-84-1026. We consolidated these appeals because the district judges who rendered final determinations in each case based their dismissals for lack of state court jurisdiction on the fact that the defendants in question were Indians and the alleged criminal acts occurred in

"Indian Country" (see 18 U.S.C. §1151).

On December 1, 1986, appellant filed a petition for rehearing. Having reviewed that petition, we find that our previous opinion should be withdrawn and these cases separated. These two cases will therefore be dealt with in separate opinions on rehearing.

IT IS THEREFORE ORDERED that the opinion of this Court in Case Nos. S-85-117 and S-84-781 be **WITHDRAWN**, and the clerk is so directed.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 26th day of July, 1988.

s/ TOM BRETT, PRESIDING JUDGE

s/ ED PARKS, JUDGE

APPENDIX D

STATUTORY PROVISIONS INVOLVED

1. The Indian Department Appropriations Act of 1897, ch. 3, 30 Stat. 62, 83, provides in relevant part:

> ****[O]n and after January first, eighteen hundred and ninety-eight, the United States courts in [the Indian] Territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted and all criminal causes for the punishment of any offense committed after January first, eighteen hundred and ninety-eight, by any person in said Territory, ***; and the laws of the United States and the State of Arkansas in force in the [Indian] Territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes; and any citizen of any one of [the Five Civilized] tribes otherwise qualified who can speak and understand the English language

may serve as a juror in any of said courts.

2. Section 14 of the Curtis Act, Act of June 28, 1898, ch. 517, 30 Stat. 495, 500, provides in part:

> ****For the purpose of this section all the laws of the State of Arkansas herein referred to, so far as applicable, are hereby put in force in [the Indian] Territory; and the United States court therein shall have jurisdiction to enforce the same, and to punish any violation thereof, and the city or town councils shall pass such ordinances as may be necessary for the purpose of making the laws extended over them applicable to them and for carrying the same into effect:***

3. Section 28 of the Curtis Act, Act of June 28, 1898, ch. 517, 30 Stat. 504-505, provides:

> That on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore

> authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred to the United States court in said Territory by filing with the clerk of the court the original papers in the suit: *Provided*, that this section shall not be in force as to the Chickasaw, Choctaw, and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight.

4. Section 3, subsections 2 and 3, and sections 13, 14, 20, and 21 of the Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 270, 275, and 277-278, provide in part:

> Sec. 3. Second: ****Upon the admission of said State into the Union these provisions shall be immediately enforceable in the courts of said State.
>
> Third. That the people inhabiting said [State of Oklahoma] do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying

within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

* * *

Sec. 13. That said State when admitted as aforesaid shall constitute two judicial districts, ****The circuit and district courts for each of said districts, and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. ****and that the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said State until changed by the legislature thereof.

Sec. 14. That all prosecutions for crimes or offenses hereafter committed in either of said judicial districts as hereby constituted shall be cognizable

within the district in which committed, and all prosecutions for crimes or offenses committed before the passage of this Act in which indictments have not yet been found or proceedings instituted shall be cognizable within the judicial district as hereby constituted in which such crimes or offenses were committed.

* * *

Sec 20. That all cases pending in the district courts of Oklahoma Territory and in the United States courts for the Indian Territory at the time said Territories become a State not transferred to the United States circuit or district courts in the State of Oklahoma shall be proceeded with, held, and determined by the courts of said State, the successors of said district courts of the Territory of Oklahoma and United States courts for the Indian Territory, ***

Sec. 21. ****and all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State, except as modified or changed by this Act or by the constitution of the State, and the laws of the United

States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States.

5. Title 68 O.S. 1981, §301 provides:

for the purposes of this article:

(a) The term "cigarette" is defined to mean and include all rolled tobacco or any substitute therefor, wrapped in paper or any substitute therefor and weighing not to exceed three (3) pounds per thousand cigarettes.

(b) The term "person" is defined to mean and include any individual, company, partnership, joint venture, joint agreement, association (mutual or otherwise), corporation, estate, trust, business trust receiver, or trustee appointed by any state or federal court, or otherwise, syndicate, or any political subdivision of the state or combination acting as a unit, in the plural or singular number.

(c) The term "wholesaler" and/or "jobber" is defined to mean and include a person, firm or corporation organized and existing, or doing business, primarily to sell cigarettes to, and render service to retailers in the territory such person,

firm or corporation chooses to serve; that purchases cigarettes directly from the manufacturer; that at least seventy-five percent (75%) of whose gross sales are made at wholesale; that handles goods in wholesale quantities and sells through salesmen, advertising and/or sales promotion devices; that carries at all times at his or its principal place of business a representative stock of cigarettes for sale, and that comes into the possession of cigarettes for the purpose of selling them to retailers or to persons outside or within the state who might resell or retail such cigarettes to consumers.

In addition to the foregoing, and irrespective of the percentage or type of sales, the term "wholesaler" shall also include all operators of four or more cigarette vending machines and all purchasers of cigarettes making purchases directly from the manufacturer for distribution at wholesale or retail sale and this shall not affect the requirements relating to retail licenses.

(d) The term "retailer" is defined to be: (First) a person who comes into the possession of cigarettes for the purpose of selling, or who sells them at

retail; or, (Second) a person, not coming within the classification of wholesaler and/or jobber as herein defined, having possession of more than one thousand cigarettes.

(e) The term "consumer" is defined to be a person who receives or who in any way comes into possession of cigarettes for the purpose of consuming them, giving them away, or disposing of them in a way other than by sale, barter or exchange.

(f) The term "Tax Commission" is defined to mean the Oklahoma Tax Commission.

(g) The term "sale" and/or "sales" is hereby defined to be and declared to include sales, barters, exchanges and every other manner, method and form of transferring the ownership of personal property from one person to another, and is also declared to be the use or consumption in this state in the first instance of cigarettes received from without the state or of any other cigarettes upon which the tax has not been paid. The term "first sale" shall mean and include the first sale or distribution of cigarettes in intrastate commerce or the first use or consumption of cigarettes within this state.

(h) The term "stamp" as herein used shall mean the stamp or stamps by use of which the tax levied hereunder is paid.

(i) The term "drop shipment" shall mean and include any delivery of cigarettes received by any person within this state when payment for such cigarettes is made to the shipper or seller by or through a person other than the consignee.

(j) The term "distributing agent" shall mean and include every person in this state who acts as an agent of any person outside the state by receiving cigarettes in interstate commerce and storing such cigarettes subject to distribution or delivery upon order from said person outside the state to distributors, wholesale dealers and retail dealers, or to consumers. The term "distributing agent" shall also mean and include any person who solicits or takes orders for cigarettes to be shipped in interstate commerce to a person in this state by a person residing outside of Oklahoma, the tax not having been paid on said cigarettes.

(k) The term "vending machine" shall mean and include any coin operating machine, contrivance, or device, by means of which

cigarettes are sold or dispensed in their original container.

(l) The term "use" means and includes the exercise of any right or power over cigarettes incident to the ownership or possession thereof, except that it shall not include the sale of cigarettes in the regular course of business.

6. Title 68 O.S. Supp. 1984, §302 provides:

There is hereby levied upon the sale, use, gift, possession, or consumption of cigarettes within the State of Oklahoma a tax at the rate of four (4) mills per cigarette. No part of the cigarette tax receipts derived from said increase in the cigarette tax rate shall be used in determining the amount of cigarette tax collections to be paid into the State of Oklahoma Building Bonds of 1961 Sinking Fund pursuant to the provisions of Sections 57.31 through 57.43 of Title 62 of the Oklahoma Statutes.

The tax hereby levied shall be paid only once on any cigarettes sold, used, received, possessed, or consumed in this state. Such tax shall be evidenced by stamps which shall be furnished by and

purchased from the Tax Commission or by an impression of such tax by the use of a metering device when authorized by the Tax Commission as provided for in this article, and said stamps or impression shall be securely affixed to one end of each package in which cigarettes are contained or from which consumed.

The impact of the tax levied by the provisions of this article is hereby declared to be on the vendee, user, consumer, or possessor of cigarettes in this state, and, when said tax is paid by any other person, such payment shall be considered as an advance payment and shall thereafter be added to the price of the cigarettes and recovered from the ultimate consumer or user. In making a sale of cigarettes in this state, a wholesaler or jobber may separately state and show upon the invoice covering such sale the amount of tax paid on the cigarettes sold. The tax shall be evidenced by appropriate stamps attached to each package of cigarettes sold. Every retailer who makes sales of cigarettes within this state to persons for use or consumption shall separately show the amount of tax paid as evidenced by appropriate stamps on each package of cigarettes sold, and the tax shall be collected by the

retailer from the user or consumer. The provisions of this section shall in no way affect the method of collection of such tax on cigarettes as now provided for by existing law. As to cigarettes packed in quantities of less than ten, for distribution as samples, payment of the tax may be made to the Tax Commission in a lump sum without affixing stamps on such packages.

7. Title 68 O.S. Supp. 1984, §302-1 provides:

> (a) In addition to the tax levied in Section 302 of this title, there is hereby levied upon the sale, use, gift, possession, or consumption of cigarettes, as defined in Sections 301 through 325 of this title, within the State of Oklahoma a tax at the rate of two and one-half (2½) mills per cigarette. Such tax shall be evidenced by tax stamps as now provided for by law for other cigarette taxes, except that as to cigarette packages of less than ten cigarettes for free distribution as samples, the tax levied in this section shall be computed and paid as provided for other cigarette taxes without affixing stamps on each such package.
>
> (b) No part of the revenues

resulting from the additional tax levied in this section shall be used in determining the amount of cigarette tax collections to be paid into the State of Oklahoma Building Bonds of 1961 Sinking Fund pursuant to the provisions of Sections 57.31 through 57.43 of Title 62 of the Oklahoma Statutes, into the State of Oklahoma Building Bonds of 1965 Sinking Fund pursuant to the provisions of Sections 57.51 through 57.60 of Title 62 of the Oklahoma Statutes, or into the State of Oklahoma Institutional Building Bonds of 1965 Sinking Fund pursuant to the provisions of Sections 57.61 through 57.73 of Title 62 of the Oklahoma Statutes.

(c) The revenues resulting from the additional tax levied in this section through June 30, 1968, shall be apportioned by the Oklahoma Tax Commission and transmitted to the State Treasurer, who shall deposit the same in the State Treasury in a fund to be known as the "State of Oklahoma Building Bonds of 1968 Reserve Fund", which fund is hereby created. The Legislature shall appropriate monies from such fund or so much thereof as may be deemed necessary; first, for the payment of interest and principal upon any bonds issued for capital improvements pursuant

to the provisions of Section 38 of Article X of the Oklahoma Constitution; second, for other capital improvements at state institutions; third, for operating expenses of such capital improvements; and fourth, for any other purposes of state government. From and after July 1, 1968, all revenues resulting from the additional tax levied in this section, except revenues dedicated to the retirement of the State of Oklahoma Building Bonds of 1968, Series A, B, C, D and E, or any refunding of any or all of such series, and except revenues required to be deposited in the Oklahoma Memorial Hospital Fund, shall be apportioned by the Oklahoma Tax Commission and transmitted to the State Treasurer, who shall deposit the same in the General Revenue Fund.

(d) The cigarette tax levied in this section shall be collected and administered in all respects not inconsistent with as now or hereafter provided for by law for other cigarette taxes now levied, collected and administered pursuant to the provisions of Sections 301 through 325 of this title.

8. Title 68 O.S. Supp. 1984, §302-2 provides:

(a) In addition to the tax levied in Sections 302 and 302-1 of this title, there is hereby levied upon the sale, use, gift, possession, or consumption of cigarettes, as defined in Sections 301 through 325 of this title, within the State of Oklahoma a tax at the rate of two and one-half (2½) mills per cigarette. Such tax shall be evidenced by tax stamps as now provided for; however, as to cigarette packages of less than ten cigarettes for free distribution as samples, the tax herein levied shall be computed and paid as provided for other cigarette taxes without affixing stamps on each such package.

(b) No part of the revenues resulting from the additional tax levied in this section shall be used in determining the amount of cigarette tax collections to be paid into the State of Oklahoma Building Bonds of 1961 Sinking Fund pursuant to the provisions of Sections 57.31 through 57.43 of Title 62 of the Oklahoma Statutes or into the State of Oklahoma Building Bonds of 1965 Sinking Fund pursuant to the provisions of Sections 57.61 through 57.73 of Title 62 of the Oklahoma Statutes.

(c) The revenue resulting from the additional tax levied in this

section shall be apportioned by the Oklahoma Tax Commission and transmitted to the State Treasurer, who shall deposit the same in the General Revenue Fund of the State of Oklahoma.

(d) The cigarette tax levied in this section shall be collected and administered in all respects not inconsistent with as now or hereafter provided for by law for other cigarette taxes now levied, collected, and administered pursuant to the provisions of Sections 301 through 325 of this title.

9. Title 68 O.S. 1981, §303 provides:

The sale gift, barter, or exchange of cigarettes or the having possession of cigarettes for consumption, is hereby declared to be subject to taxation authorized by Section 12, Article X, Oklahoma Constitution, and it is the purpose and intention of the State of Oklahoma, and it is the purpose and intention of this article, to provide revenue for the expense of the state government. The revenuse, including interest and penalties, collected under this article shall be paid monthly by the Tax Commission to the State Treasurer to be placed in the General Revenue Fund of the state, to be

paid out only on direct appropriations of the Legislature of the State of Oklahoma.

10. Title 68 O.S. 1981, §304 provides, i

pertinent part:

> (a) Every manufacturer, wholesaler, warehouseman, jobber or distributor of cigarettes in this state, as a condition of carrying on such business, shall annually secure from the Tax Commission a written license, and shall pay therefor an annual fee of Twenty-five Dollars ($25.00). This license, which will be for the ensuing year, must at all times be displayed in a conspicuous place so that it can be seen. Persons operating more than one place of business must secure a license for each place of business. Place of business shall be construed to include the place where orders are received, or where cigarettes are sold. If cigarettes are sold on or from any vehicle, the vehicle shall constitute a place of business and the regular license fee of Twenty-five Dollars ($25.00) shall be paid with respect thereto. However, if the vehicle is owned or operated by a place of business for which the regular Twenty-five Dollars ($25.00) is paid, the annual fee for the license with respect to such

vehicle shall be only Ten Dollars ($10.00).

Provided, that no license for the sale of cigarettes or tobacco shall be issued to any manufacturer, wholesaler, warehouseman, jobber or distributor who does not maintain a place of business within the State of Oklahoma at which all products sold within this state are stocked, sold and delivered, and from which vehicles classed as a "place of business," as hereinabove defined, are loaded and operated, and where all records and accounts are kept, and necessary accounting procedures are performed; but these provisions shall not apply to manufacturers, wholesalers, warehousemen, jobbers or distributors having a place of business located in another state where such state does not require manufacturers, wholesalers, warehousemen, jobbers or distributors who have their place of business in Oklahoma to maintain a warehouse or place of business in such other state in order to secure a license to do business in such state.

Provided, further, that the Oklahoma Tax Commission shall not authorize the use of a stamp-metering device by any manufacturer, wholesaler,

warehouseman, jobber or distributor who does not maintain a warehouse or wholesale establishment or place of business within the State of Oklahoma from which cigarettes are received, stocked and sold and where such metering device is kept and used; but the Tax Commission may, in its discretion, permit the use of such metering device by manufacturers, wholesalers, warehousemen, jobbers or distributors of cigarettes residing wholly within another state where such state permits a licensed Oklahoma resident, manufacturer, wholesaler, warehouseman, jobber or distributor of cigarettes the use of the metering device of such state without first requiring that such manufacturer, wholesaler, warehouseman, jobber or distributor establish a place of business in such other state. The provisions of this paragraph relating to metering devices shall not apply to states which do not require the affixing of tax stamps to packages of cigarettes before same are offered for sale in such states.

(b) Every retailer in this state, as a condition of carrying on such business, shall annually secure from the Tax Commission a license and shall pay therefor an

annual fee of Ten Dollars ($10.00). Such license, which will be for the ensuing year, must at all times be displayed in a conspicuous place so that it can be seen. Every person operating under such license as a retailer and who owns or operates more than one place of business must secure a license for each place of business. Place of business shall be construed to include places where orders are received or where cigarettes are sold.

(c) Every distributing agent shall, as a condition of carrying on such business, pursuant to written application on a form prescribed by and in such detailed form as the Tax Commission may require, annually secure from the Tax Commission a license, and shall pay therefor an annual fee of One Hundred Dollars ($100.00). An application shall be filed and a license obtained for each place of business owned or operated by a distributing agent. The license, which will be for the ensuing year, shall be consecutively numbered, nonassignable and nontransferable, and shall authorize the storing and distribution of unstamped cigarettes within this state when such distribution is made upon

interstate orders only.

* * * * *

(4) All wholesale, retail, vending machine, and distributing agent's licenses shall be nonassignable and nontransferable from one person to another person. Such licenses may be transferred from one location to another location after an application has been filed with the Commission requesting such transfer and after the approval of the Commission.

(5) Wholesale, retail, vending machine, and distributing agent's licenses shall be applied for on a form prescribed by the Commission and must be properly acknowledged by a notary public or by an agent of the Commission. Any person operating as a wholesaler, retailer, distributing agent, or vending machine operator, must at all times have an effective unexpired license which has been issued by the Commission. If any such person or licensee continues to operate as such on a license issued by the Commission which has expired, or operates without ever having obtained from the Commission such license, he shall, after becoming delinquent for a period in excess of fifteen (15) days pay to the Commission,

in addition to the annual license fee, a penalty of twenty-five cents ($0.25) per day on each delinquent license for each day so operated in excess of fifteen (15) days. The penalty provided for herein shall not exceed the annual license fee for such license. * * * * *

11. Title 68 O.S. 1981, §305 provides:

(a) Every wholesaler, jobber, or warehouseman doing business within this state and required to secure a license as provided under Section 304 of this Code shall, upon withdrawal from storage, and before making any sale or distribution for consumption thereof, cause the same to have affixed thereto the stamp or stamps as required by this article. It shall be the duty of the wholesaler, jobber, or warehouseman to supply and charge to the retailer the necessary stamps to cover any and all drop shipments of cigarettes billed to the retailer or consumer by the wholesaler, jobber, or warehouseman; and the wholesaler, jobber, or warehouseman shall be liable to the Commission to perform this service.

(b) Every retailer who has received cigarettes from a manufacturer, wholesaler, jobber,

warehouseman or distributor not required to secure a license as provided for under Section 304 of this Code, or to affix stamps as required under the preceding paragraph, shall, within seventy-two (72) hours, excluding Sundays and holidays, from the time such cigarettes come into his possession, and before making any sale or distribution for consumption thereof, affix stamps upon all cigarette packages in the proper denomination and amount, as required by Section 302 of this Code.

(c) Any unlicensed consumer who buys direct from any distributor, jobber, manufacturer, warehouseman, or wholesaler, or other person, within or without this state, any cigarettes in excess of forty, at any one time to which are not affixed the stamps required by this article shall, before purchasing such cigarettes, secure from the Tax Commission a written license and shall pay therefor an annual fee of Twenty-five Dollars ($25.00), and shall post with the Commission a surety bond in the sum of One Thousand Dollars ($1,000.00), conditioned that he will comply with the rules and regulations of the Tax Commission and pay all taxes and penalties and affix to all such cigarettes the proper tax stamps as provided

by law, and he shall immediately, upon the receipt of any unstamped cigarettes, report the same to the Tax Commission on such forms as the Commission may prescribe, and immediately purchase from the Commission proper stamps and attach the same to all such cigarettes received. It shall be unlawful for any person to sell or consume cigarettes on which the tax, as levied by this article, has not been paid, and which are not contained in packages to which are securely affixed the stamps evidencing payment of the tax imposed by this article.

If, upon examination of invoices or from other investigations, the Commission finds that cigarettes have been sold without stamps affixed as required by this article, the Commission shall have the power to require such person to pay to the Commission a sum equal to twice the amount of the tax due. If, under the same circumstances, a person is unable to furnish evidence to the Commission of sufficient stamp purchases to cover unstamped cigarettes purchased by him, the prima facie presumption shall arise that such cigarettes were sold without proper stamps being affixed thereto.

(d) (1) All unstamped cigarettes

upon which taxes are imposed by this article which shall be found in the possession, custody, or control of any person, for the purpose of being consumed, sold or transported from one place to another in this state, for the purpose of evading or violating the provisions of this article, or with intent to avoid payment of the tax imposed hereunder, and any automobile, truck, conveyance, or other vehicle whatsoever used in the transportation of such cigarettes, and all paraphernalia, equipment or other tangible personal property incident to the use of such purposes, found in the place, building, vehicle or vehicles, where such cigarettes are found, may be seized by any authorized agent of the Tax Commission, or any sheriff, deputy sheriff, constable or other peace officer within the state, without process; and the same shall be, from the time of such seizure, forfeited to the State of Oklahoma, and a proper proceeding filed in a court of competent jurisdiction in the county of seizure, to maintain such seizure and prosecute said forfeiture as herein provided.

(2) All such cigarettes, vehicles and property so seized, as aforesaid, shall first be listed

and appraised by the officer making such seizure and turned over to the county sheriff of the county in which the seizure is made and a receipt therefor taken; and the person making such seizure shall immediately make and file a written report thereof, showing the name of the person making such seizure, the place, and the person where, and from whom such property was seized, and an inventory and appraisement thereof, at the usual and ordinary retail price of such articles received, to the Tax Commission. The district attorney of the county in which the seizures are made shall, at the request of the Tax Commission, file in the district court forfeiture proceedings in the name of the State of Oklahoma, as plaintiff, and in the name of the owner or person in possession, as defendant, if known, and if unknown in the name of the property seized. The clerk of the court shall issue summons to the owner or person in whose possession such property was found, directing him to answer within ten days. If the property is declared forfeited and ordered sold, notice of the sale shall be posted in five public places in the county not less than ten (10) days before the date of sale. The proceeds of said sale shall be deposited

with the clerk of the court, who shall after deducting costs, including the costs of sale, pay the balance to the Tax Commission as cigarette tax collected.

(3) The seizure and sale of said cigarettes shall not relieve the person from whom such cigarettes were seized from any prosecution or the payment of any penalties provided for under this article; nor shall it relieve the purchaser thereof from any payment of the regular cigarette tax and the placing of proper stamps thereon before making any sale of said cigarettes or the personal consumption of the same.

(4) The forfeiture provisions of this article shall only apply to persons having possession of or transporting cigarettes with intent to barter, sell or give away the same; provided, that such possession of cigarettes in any quantity of five or more cartons of ten packages each shall be prima facie evidence of intent to barter, sell or give away such cigarettes in violation of the provisions of this article.

(e) The Tax Commission shall exchange new stamps for any stamps which are damaged, or for stamps which have been affixed to packages of cigarettes returned

to factories, or shipped to other states, or sold to government agencies or state institutions, or for stamps purchased in excess of floor stocks. Application to the Tax Commission for such exchanges must be accompanied by affidavit, damaged stamps, bill of lading covering shipment to factory or other states, or other proof required by the Tax Commission. Any person to whom stamps shall be issued under this paragraph may, upon approval of the Tax Commission, sell such stamps to any wholesaler as defined in this article.

(f) Any person, including distributing agents, wholesalers, jobbers, carriers, warehousemen, retailers and consumers, having possession of unstamped cigarettes in this state shall be liable for the tax on such cigarettes in case the same are lost, stolen or unaccounted for, in transit, storage or otherwise, and in such event a presumption shall exist for the purposes of taxation, that such cigarettes were used and consumed in Oklahoma.

12. Title 68 O.S. 1981, §306 provides:

It shall be unlawful for any person to sell, or display for sale, or have in his possession for consumption in this state,

cigarettes on which the tax levied by this article has not been paid, and which are not contained in packages to which are securely affixed the stamps evidencing payment of the tax. Any cigarettes so held shall be subject to seizure and sale as provided by law for sale of property under execution, and the proceeds derived from the sale thereof shall be paid to the State Treasurer and placed in the State General Revenue Fund.

13. Title 68 O.S. 1981, §307 provides:

A consumer who secures cigarettes from without the state and has same brought into the state by a common carrier or otherwise shall be held to be a retailer, and its, his or her place of business shall be deemed the point within the state at which the cigarettes are received. Such person holding himself out as consumer and purchasing cigarettes in a larger quantity than forty shall be subject to the same provisions, rules and regulations with respect to cigarettes as are by this article imposed upon retailers.

14. Title 68 O.S. 1981, §308 provides:

(a) The stamps placed upon packages of cigarettes shall be purchased by the Commission in

proper denominations, shall contain the words "Oklahoma Tax Commission," and shall be of such design, character, color combinations, color changes, sizes and material as the Commission may, by its rules and regulations, determine to afford the best security to the state. The Commission may require of the manufacturer from whom it purchases such stamps a bond in an amount to be determined by the Commission, containing such conditions as the Commission may deem necessary in order to protect the state against loss. The Commission shall be responsible for the custody and sale of the stamps, and for the disposition of the proceeds thereof. It shall be the duty of the Tax Commission to manufacture or contract for revenue stamps required by this article; provided, that if such stamps are contracted for, the manufacture thereof shall be within the jurisdiction of the criminal and civil courts of this state, unless such stamps cannot be obtained in this state at a fair price or of acceptable quality. If stamps are manufactured outside of the state, then the Commission shall keep a reliable agent at the place of manufacture during the period of manufacture and such agent shall be authorized and instructed to take

any and all precautions necessary to safeguard the state against forgery and misdelivery of any stamps. The Commission shall, in contracting for manufacture, consider the safeguarding of stamps to be of paramount importance and shall provide therefor in a manner commensurate with the monetary value of such stamps.

(b) The Tax Commission shall, under rules and regulations promulgated by the Commission, exchange new stamps or give credit for any stamps affixed to any cigarettes which stamps have become unfit for use or consumption or unsalable.

(c) Any person to whom stamps shall be issued hereunder may, upon notice and approval of the Tax commission, sell such stamps to any licensed manufacturer, wholesaler, warehouseman, jobber and/or retailer.

(d) The Commission shall sell the stamps to all licensed manufacturers, wholesalers, warehousemen and/or jobbers, retailers, or consumers, who have purchased cigarettes from wholesalers or jobbers within or without the State of Oklahoma, doing business within the State of Oklahoma. All orders for stamps must be accompanied by

cash, cashier's check or money order, made payable to the Oklahoma Tax Commission; provided, however, that the Tax Commission may accept personal checks in payment for such stamps upon a determination by the Commission that the purchaser thereof is financially responsible.

15. Title 68 O.S. 1981, §312 provides:

(a) Every person subject to the payment of a tax hereunder shall keep in Oklahoma accurate records covering the business carried on and shall for three (3) years, and more if required by the rules and regulations of the Tax commission, keep and preserve all invoices, showing all purchases and sales of cigarettes; and such invoices and stock of cigarettes shall at all times be subject to the examination and inspection of any member or legally authorized agent or representative of the Commission, in the enforcement of this article. Every wholesaler, jobber, warehouseman or retailer operating in the State of Oklahoma, whose main warehouse or headquarters is in another state shall keep all records of all cigarette transactions made by him at his place of business in Oklahoma, or at a designated place in the State of Oklahoma.

(b) Every wholesaler and retailer receiving unstamped cigarettes shall file a report with the Commission on or before the 10th day of each month covering the previous calendar month, on forms prescribed and furnished by the Commission, disclosing the beginning and closing inventory of unstamped cigarettes, the beginning and closing inventory of stamped cigarettes, the beginning and closing inventory of cigarette stamps, the number and denomination of cigarette stamps affixed to packages of cigarettes, and all purchases of cigarettes by showing the invoice number, name and address of the consignee or seller, the date, and the number of cigarettes purchased, and such other information as may be required by the Tax commission. Retailers or consumers purchasing cigarettes in drop shipments shall be required to make monthly reports to the Commission as are required of wholesale dealers.

(c) Every distributing agent shall, except as otherwise provided herein, keep at each place of business in Oklahoma for a period of three (3) years for inspection by the Commission a complete record of all cigarettes received by him, including all orders, invoices, bills of lading, waybills, freight bills,

express receipts, and all other shipping records which are furnished to the distributing agent by the carrier and the shipper of said cigarettes, or copies thereof, and, in addition thereto, a complete record of each and every distribution or delivery made by said distributing agent. Such records of distribution or delivery shall include all orders, invoices or copies thereof, all other shipping records furnished by the carrier, and the person ordering distribution or delivery of the cigarettes.

(d) Upon a form to be prescribed by the Commission, every distributing agent in Oklahoma shall report each day, except Sundays and holidays, to the Commission all deliveries of cigarettes made on the preceding day or days. The reports shall show the name of the person ordering the delivery, date of delivery, name and address of the person to whom delivered, the invoice number, bill of lading or waybill number, the number and kind of cigarettes delivered, the means of delivery and/or the transportation agent and the destination of drop shipment, if a drop shipment. However, if the invoice furnished the distributing agent by the manufacturer or other person

ordering such delivery, or the bill of lading prepared by said distributing agent to cover the shipment under said invoice, contains all the information required to be reported, it will be sufficient to send a copy of said invoice or invoices, or a copy of said bill of lading or bills of lading, to the Commission.

16. Title 68 O.S. 1981, §315 provides:

For the purpose of enabling the Oklahoma Tax Commission to determine the tax liability of a distributor, wholesale dealer, retail dealer, distributing agent or any other person dealing in cigarettes, or to determine whether a tax liability has been incurred, it shall have the right to inspect any premises where cigarettes are manufactured, produced, made, stored, transported, sold, or offered for sale or exchange, and to examine all of the records required herein to be kept or any other records that may be kept incident to the conduct of the cigarette business of such distributor, wholesale dealer, retail dealer, distributing agent, or any other person dealing in cigarettes. The authorized agent of the Oklahoma Tax Commission shall also have the right, as an incident, to determine the said

tax liability, or whether a tax liability has been incurred, to examine all stocks of cigarette stamps, and for the foregoing purpose such authorized agent shall also have the right to remain upon the premises for such length of time as may be necessary to fully determine such tax liability, or whether a tax liability has been incurred; and it shall be unlawful for any of the foregoing persons to fail to produce upon demand by the Tax Commission, or any of its authorized agents, any records herein required to be kept, or to hinder or prevent in any manner the inspection of said records, or the examination of said premises.

17. Title 68 O.S. 1981, §316 provides:

(a) Any person, as defined in this article, who shall:

(1) sell, offer for sale or present as a prize or gift cigarettes without a stamp being then and there affixed to each individual package;

(2) sell cigarettes in quantities less than an individual package;

(3) knowingly consume, use or smoke any cigarettes upon which a tax is required to be paid

without a stamp being affixed upon each individual package;

(4) knowingly cancel or mutilate any stamp affixed to any individual package of cigarettes for the purpose of concealing any violation of this article or with any other fraudulent intent;

(5) use any artful device or deceptive practice to conceal any violation of this article;

(6) refuse to surrender to the Tax Commission upon demand any cigarettes possessed in violation of any provision of this article;

(7) make a first sale of cigarettes without a stamp being then and there affixed to each individual package; shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than Two Hundred Dollars ($200.00), where specific penalties are not otherwise provided.

(b) Any distributor, wholesale dealer, retail dealer or distributing agent who shall:

(1) commit any of the acts specifically enumerated in subdivision (a) of this section, where such acts are applicable to such person;

(2) sell any cigarettes upon which tax is required to be paid by this article without at the time of making such sale having a valid license;

(3) make a first sale of cigarettes without at the time of said first sale having a license posted so as to be easily seen by the public;

(4) fail to deliver an invoice required by law to a purchaser of cigarettes; shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than Two Hundred Dollars ($200.00), where specific penalties are not otherwise provided.

(c) Any distributing agent, as defined in this article, who shall:

(1) commit any of the acts specifically enumerated in subdivisions (a) and (b) of this section where such provisions are applicable to such distributing agent;

(2) store any unstamped cigarettes in the state or deliver or distribute any unstamped cigarettes within this state, without at the time

of said storage or delivery having a valid license posted so as to be easily seen by the public; shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than Two Hundred Dollars ($200.00).

18. Title 68 O.S. 1981, §317(b) provides:

Each person violating any other provision of this article shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a period of not more than twelve (12) months, or by a fine of not more than Five Hundred Dollars ($500.00), or by both such imprisonment and fine.

APPENDIX E

IN THE DISTRICT COURT OF
TULSA COUNTY
STATE OF OKLAHOMA

CONSOLIDATED CASES

No. CRM-82-537

STATE OF OKLAHOMA, PLAINTIFF

v.

ROBERT M. WELCH, DEFENDANT

No. CRM-82-538

STATE OF OKLAHOMA, PLAINTIFF

v.

DICK EARL KLINDT, DEFENDANT

No. CRF-82-821

STATE OF OKLAHOMA, PLAINTIFF

v.

DICK EARL KLINDT, DEFENDANT

DECISION ON DEFENDANTS
MOTION TO QUASH

The above styled and numbered case arise out of an incident on March 1, 198 when agents of the Oklahoma Ta Commission assisted by deputy sheriffs o Tulsa County, Oklahoma, sought to seiz allegedly unstamped contraband cigarette under the control of the defendants at "smoke shop" on a tract of land withi Tulsa County near the town of Sperry.

The evidence adduced at a hearing o March 26, 1982 as well as facts which th parties agree are not in dispute sho that the defendants are the agents of th Delaware Indian Tribe or Nation defendant Klindt being the operator o the tribe's cigarette store or business popularly known as a "smoke shop", an defendant Welch being a Delaware Triba

policeman. This Tribal business and the activities of the defendants on behalf of the tribe and in regard to the business were centered on a tract of land in North Tulsa County, just east of the town of Sperry. The tract of land was a part of an original allotment by the Cherokee Indian Nation to a full-blood Cherokee Indian who was the mother of the current beneficial owner and occupant, Mrs. Washington, who testified at the March 26 hearing.

The defendants' exhibits one and two set forth the legal description of the land in question and disclosed the exact interests which Mrs. Washington and the Delaware Indian Nation have with respect thereto. Mrs. Washington some years ago conveyed the land in trust to the United States of America, reserving to herself

a life estate with the land to b distributed to her children upon he death. Mrs. Washington recently lease the tract to the Delaware Nation for th purpose of operating its retail cigarett business. Mrs. Washington resides on th tract of land and also leases a surfac use to a neighbor to graze horses.

Mrs. Washington recounted th original Cherokee allotment to he mother, a fullblood Cherokee, and he inheritance of a one-third interest i the allotment with an eventual partitio of her one-third interest. Mrs Washington herself is an enrolle fullblood Cherokee and her portion of th original allotment obviously has bee always owned by a fullblood Cherokee an has always been tax exempt. It currentl is tax exempt.

It is the contention of the defendants that the tract of land is an Indian allotment, the Indian rights to which have never been extinguished, and it is, therefore, "Indian Country" over which the State of Oklahoma has no jurisdiction, civil or criminal. Coupled with this proposition, the defendants further contend that the State of Oklahoma has no jurisdiction to tax or otherwise regulate the tribal affairs of the sovereign Delaware Nation, particularly a business which it conducts in "Indian country" physically and legally beyond the State's jurisdiction.

The defendants' arguments on these points are set forth and summarized in the following excerpts from their brief:

> "The sole question before the Court at the present time, is whether or not the State of Oklahoma has civil or criminal

jurisdiction over Indian businesses operating in Indian Country located within the State of Oklahoma." (page 3)

* * *

"A review of the language of the Organic Act, Enabling Act, State Constitution and the treaties, clearly establishes that there was no intent on the part of Congress to extend to the State of Oklahoma jurisdiction over Indians or to Indian land held by Indians or Indian tribes." (page 4)

* * *

"The State of Oklahoma had, until just recently, been of the view that they had been given civil and criminal jurisdiction at statehood and therefore were not subject to the Public Law 280 requirements; and therefore failed to remove the impediments to assumption of jurisdiction found in their constitution. This erroneous view has now been changed. The State Attorney General of the State of Oklahoma issued his opinion that:

> "It, therefore, appears that no congressional act has expressly delegated authority to the State of Oklahoma to

assume jurisdiction over crimes committed by Indians against Indians upon territory under the concurent [sic] jurisdiction of the federal and tribal governments." Attorney General Opinion, 78-176.

Both State and Federal Court cases have upheld and agreed with the State Attorney General's Opinion finding that the State of Oklahoma has no jurisdiction over crimes committed on Indian land by Indians. State v. Little Chief, 573 P.2d 263 (Okl. Cr. App. 1978); CMG v. State of Oklahoma, 594 P.2d 798 (Okl. Cr. App. 1979); Cheyenne-Arapaho Tribes of Oklahoma v. State of Oklahoma, 618 F.2d 665 (1980).: (page 8)

* * *

"Absent any expressed grant of power by the Federal government, the Sate [sic] is totally lacking in subject matter jurisdiction to pass either civil or criminal laws which effect either Indians, Indian tribes or Indian owned and operated businesses located upon Indian Country." (page 8)

* * *

"The general criminal jurisdiction statutes applicable

to Indian Country are found at 18 U.S.C.S. §1151 et seq. "Indian Country" is defined as:

> "(c) all Indian allotments, the Indian titles to which have not been extinguished including rights-of-way running through the same." 18 U.S.C.S. §1151(c)

* * *

The testimony set out at the motion hearing and the Deed introduced into evidence clearly indices [sic] this tract in question is clearly restricted Indian allotment land to which the Indian title has not been extinguished and therefore, falls within the definition of Indian Country for jurisdictional purposes." (page 9)

* * *

"It is clear that from the limitations imposed by the Organic and Enabling Acts and further set out in the Oklahoma Constitution that the State of Oklahoma has no right to legislate or enforce State laws against Indian Tribes or Indians within Indian Country." (page 9)

* * *

"The State of Oklahoma finds

itself now in the position occupied by the State of Arizona in McClanahan, supra. All activities conducted by the tribe through Mr. Klindt, their employee, were conducted in Indian Country. The State has no criminal or civil jurisdiction as against the Delaware Indian Tribe or its actions within Indian Country." (page 10)

* * *

Clearly, in the State of Oklahoma, there is no means by which the State of Oklahoma can validly enforce their taxing scheme against Indian tribes on Indian lands. The criminal penalties which are found within the Oklahoma Statutes relating to cigarette tax violations can clearly not be enforced against the Indian tribes on Indian lands." (page 10)

In regard to defendants' first contention that this former Cherokee allotment tract itself is "Indian Country" beyond the jurisdiction of the State of Oklahoma, the court would note if this case presented a question of

first impression, the argument ar
authority of the defendant on this poir
would be most compelling. However, thi
case does not present a question of firs
impression; in 1936 the Criminal Court o
Appeals of Oklahoma decided the case o
Ex Parte Nowabii [sic], 60 Okl. Cr. 111
61 P.2d 1139, wherein the issue of th
status of an allotment by one of the Fiv
Civilized Tribes was determined by way o
an exhaustive analysis similar to tha
proffered by the defendant herein, bu
with the contrary conclusion.

The Court in its syllabus of th
Nowabii [sic] case stated in pertinen
part:

> "...the lands within that part of the state, formerly the Indian Territory, are not Indian country within the meaning of Section 2145, U.S. Rev. Stat. and State Courts have jurisdiction to prosecute and sentence under the state laws one Indian for a crime

committed against another on such lands. (61 P.2d at 1140)

* * *

"...the criminal laws of the State, except so far as restricted by the authority of Congress to regulate commerce 'with the Indian Tribes' extend to all crimes committed on lands within that part of the state that was formerly the Indian Territory." (emphasis added)

This Court will not attempt a summary or restatement of the analysis of the Court in the Nowabii [sic] and has opted to append a copy of that case in its entirety to this decision.** I would note, however, the opinion turns in one important respect on the fixing of relations between the United States, the Five Civilized Tribes and the State of Oklahoma upon its admission as a state in

**[Due to the length of the Nowabbi decision, Petitioner has not attached a copy of that decision to this opinion.]

the Union, and the extension of criminal law jurisdiction by the United States to the State at that time. It was the Court's decision that Congress intended for the State upon admission to assume jurisdiction of allotments of the Five Civilized Tribes in Indian Territory and that the State did validly assume such jurisdiction. I would also cite two of the Court's brief concluding paragraphs:

> "We have no doubt the criminal laws of the State applies to Indians in that part of the state that was formerly Indian Territory and that they are not subject to federal law, except in the cases where Congress has so expressly provided, as in the acts dealing with the subject of intoxicating liquors."
>
> * * *
>
> "For the reasons stated, we hold that the jurisdiction of the State Courts, as fixed by the Constitution and laws of the State, extends to the counties of that part of the State that was formerly Indian Territory."

The only other case in which the Court had occasion to reconsider its holding in Nowabii [sic] was Ex Parte Wallace 162 P.2d 205 (1945) wherein the Court restated its holding as respects Indian Territory, but distinguished the situation where Indian lands were located in the former Oklahoma Territory portion of the state:

> "The above provision of the United States Code here involved, particularly with reference to the Five Civilized Tribes was discussed at length by this Court in Ex Parte Nowabii [sic]. (citation omitted) It was therein held that the term "Indian Country" as used in the provision of the Code 25 U.S.C.A. §217 did not extend to territory occupied by the Five Civilized Tribes. It was further held:
>
> > "Criminal laws of the State, except so far as restricted by authority of Congress to regulate commerce with Indian Tribes, extend to all crimes committed on lands within part of state that was

> formerly Indian Territory in absence of contrary provision in Enabling Act or treaty with Five Civilized Nations or Tribes." (citation omitted)

The evidence shows that the land in question was an allotment by the Cherokee Nation to a fullblood Cherokee. This was part of the lands formerly comprising Indian Territory. It is interesting to note that the Nowabii [sic] case referenced the allotment acts of all the Five Civilized Tribes including that of the Cherokee's (61 P.2d at 1144) and that such were considered in the Court's analysis in reaching its conclusion.

Although the Nowabii [sic] case indicates that a dicotomy [sic] exists as regards the concept of "Indian Country" depending upon whether the allotment was from one of the Five Civilized Tribes and

a part of Indian Territory as opposed to deriving from another allotment act and being other than in Indian Territory, such a distinction is not historically that unusual. As pointed out in Section 26, Oklahoma Indian Land Titles:

> "For more than seventy-five years the Five Civilized Tribes have been distinguished in Federal legislation and in departmental matters as a group entirely separate from other groups of Indians. The laws that relate to the Indians coming under the General Allotment Act and the laws that relate to the Osages are a separate set of laws. The areas embraced in the separate domains of the Five Tribes were never treated as reservations in the sense in which Indians coming under the General Allotment Act were treated as Indians living upon reservations."

The conclusion drawn by the Court in Nowabbi [sic] and the distinction therein from the cases relied upon by the defendant compells [sic] this Court to

recognize its jurisdiction in these cases at bar.

In addition, this Court does not regard the fact that the title to the land in question is held in trust by the United States to adversely affect the jurisdiction of this Court. The United States Supreme Court has recognized that property and its ownership is a "bundle of privileges". Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S. Ct. 1267, 36 L.Ed2d 115 (1973). The holding of title is but one of the incidents of ownership, however, and there can exist apart from title many beneficial rights which substantially amount to full ownership, a good example is the case at bar. Mrs. Washington has reserved in herself full and exclusive use and enjoyment of the property during her

lifetime not withstanding having conveyed "title ownership" with the United States. She has also designated the person to whom "complete" title shall pass upon her death, as effectively as if she had devised it by will, another of the bundle of privileges. She further reaps the benefits otherwise attendant with ownership such as tax exemption of the mobile home located on the property as well as the rights, benefits and revenue of leases to the property, such as that to Delaware Indian Nation and her neighbor who grazes horses thereon. Insofar as Mrs. Washington's beneficial interests are concerned, the State of Oklahoma has jurisdiction of same and it is from such beneficial interests that the Delaware Nation derives its interest in the land in question and, not from the

United States government.

The decision that the land i question is not "Indian Country" an therefore within the territoria jurisdiction of this Court does no resolve the defendants' second issue o subject matter jurisdiction. Th defendants have alleged that the State o Oklahoma is without power to legislat with respect to the tribal affairs of th Delaware Nation and particularly canno regulate its business and financia affairs nor tax its income derived from or activities carried out on, its holdings and land. Defendants furthe urge that this Court as a instrumentality of the State has no powe to hear and determine such subject matters same having been preempted an reserved by the U.S. Constitution t

Congress and the Federal Courts.

The defendants point out herein that the Delaware Nation holds a leasehold interest on tax exempt, trust land that was allotted by the Cherokee Indian Nation (of which the Delaware Nation is an assimilated entity) to a fullblood Cherokee allottee and which land has continuously been held either outright; or in trust, by and for, fullblood Indians. For the State to tax and this Court to decide issues pertaining to the Delaware's tribal business of selling cigarettes thereon would infringe first of all upon the sovereignty of the Delaware Nation and secondly would infringe upon the plenary power of Congress and established, preeminent federal policy with respect to regulating commerce between Indians and non-Indians.

At the outset the Court would note that the Indian Tribal status and recognition of the Delaware Indian Nation by the United States Government is well established and a matter of special noteworthiness in the field of "Indian Law." As pointed out by the defendants' brief, the Delaware were the first Indian tribe to sign a treaty with the United States government. A brief history of the Delaware Nation's relationship with the United States government and their adoptive tribe, the Cherokees, appears in Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 97 S.Ct. 911 51 L.Ed2d 173 (1977) (see also Section 6, Oklahoma Indian Land Titles Annotated as well as Section 23 of the text of the Cherokee Treat, infra).

This Court takes judicial notice of

the Delaware Indian Nation as well as the sovereignty, power, authority, rights and privileges secured to the Delawares by treaty, Acts of Congress or otherwise provided by law. However, it is also important to point out that Delaware Indian "smoke shop" is located on a leasehold. The land is not owned by the Delaware Nation by virtue of treaty, grant or conveyance. It was not reserved by the Cherokee tribe for tribal purposes (see Section 24, text of the Cherokee Treaty approved by Act of Congress, July 1, 1902, 32 Stat. 716, Appendix, Oklahoma Indian Land Titles Annotated, page 658 et seq.)

The Supreme Court of the United States has decided the liability of an Indian Tribe to state taxation of its business enterprises on leased land

beyond its lands which were originally established for tribal purposes. In the case of Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.ed2d 115 (1973) the Court held that the State could impose a nondiscriminatory gross receipts tax on a ski resort operated by the tribe on off-reservation land the tribe leased from the Federal government.

The Court per Justice White began its decision by rejecting the broad assertion that the Federal government has exclusive jurisdiction over Indian tribal affairs. The Court noted that such questions are best decided by individualized treatment of particular treaties and specific federal statutes, including statehood enabling acts as they, taken together, affect the respective rights of states, Indians and

the Federal government. (Recall and compare this approach of the U.S. Supreme Court with that of the Court of Criminal Appeals in the Nowabii [sic] case where such an analysis lead the Court to conclude the State had criminal jurisdiction of Indian allotments in Indian Territory upon gaining statehood.)

The Court distinguished between state laws attempting to reach income and activities on Indian land and state authority over tribal activities conducted outside reserved land. The Court noted that it had previously acknowledged that state authority over Indians is yet more extensive over activities not on any reservation. The Court said:

> "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject

> to nondiscriminatory state law otherwise applicable to all citizens of the state." (citations omitted) That principle is as relevant to a state's tax laws as it is to state criminal laws, ..." (citation omitted)

The Court went on to cite several cases dealing with State taxation of Indian lands and the proceeds therefrom and in particular Oklahoma Tax Commission v. Texas Co., 336 U.S. 342, 69 S.Ct. 561 93 L.Ed. 721 (1949) which in effect held that the fact Congress had power to exempt such Indian assets from taxation was indicative of the Constitutional authority of the State of Oklahoma to tax absent such Congressional action.

The primary consideration of the Mescalaro case was the applicability of the Indian Reorganization Act of 1934. However, in construing the Act to

determine whether the land under the Act was subjected to any state taxation, the United States Supreme Court looked to other policies regarding taxation of Indian assets. One such policy the Court referenced in construing the Act was that:

> "...absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax."

The Supreme Court went on to discuss the disfavor of non-specific tax exemptions even where Indian Tribes were concerned:

> "This Court has repeatedly said that tax exemptions are not granted by implication... It has applied that rule to taxing acts affecting Indians as to all others... If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax

applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences." Oklahoma Tax Commission v. United States, 319 U.S. at 606-607, 63 S.Ct., at 1288. See Squire v. Capoeman, supra, 351 U.S., at 6, 76 S.Ct., at 614. Absent a "definitely expressed" exemption, an Indian's royalty income from Indian oil lands is subject to the federal income tax although the source of the income may be exempt from tax. Choteau v. Burnet, 283 U.S. 691, 696-697, 51 S.Ct. 598, 600-601, 75 L.Ed. 1353 (1931). The Court has also held that a state, as well as the Federal Government, may tax an Indian's pro rata share of income from a tribe's restricted mineral resources. Leahy v. State Treasurer, 297 U.S. 420, 56 S.Ct. 507, 80 L.Ed. 771 (1936). Lessees of otherwise exempt Indian lands are also subject to state taxation. Oklahoma Tax Commission v. Texas Co., 336 U.S. 342, 69 S.Ct. 561, 93 L.Ed. 721 (1949).

The Court concluded by noting that in the Mescalero case "the rights and land were acquired by the tribe beyond

its reservation borders for the purpose of carrying on a business enterprise" and that the Court would not imply an expansive immunity from ordinary income taxes that businesses throughout the State are subject to.

It is clear from the Mescalero case and the authority cited therein that Indian Tribes have no inherent tax exempt status by virtue of being Indian tribes. It is also clearly recognized that the States may tax in a nondiscriminatory manner business activities and assets which have a situs beyond reserved Indian lands and which are not confined to internal tribal dealings and affairs.

The testimony of Mr. Secondine, the chief executive officer of the Cherokee affiliated Delaware Indian Tribe, indicates that the "smoke shop" in

question is the retail cigarette business of his tribal entity. The evidence further indicates this business is carried out on a tract of land which was originally a Cherokee Indian allotment, the Indian rights to which have never been extinguished. However, the case authority, supra, indicates such an allotment is under the jurisdiction of the State of Oklahoma and its significance as "Indian land" is personal to the allottee and fullblood heirs. As far as Oklahoma law is concerned the Delaware Indian Tribe is in no different position with respect to the regulation and taxation of its retail cigarette business by reason of its lease thereof and operation thereon than if the tribe had leased a store on Main Mall in downtown Tulsa.

Beyond these considerations, the taxing act itself must be examined, because the tax therein is not a tax on Indians or Indian lands or income or Indian assets.

The Oklahoma legislature has expressed its intention in the Cigarette Tax Act, 68 O.S. 301 et seq. to control, regulate and tax the cigarette trade, cigarette distribution and cigarette consumption in Oklahoma. The act is comprehensive in its scope and provides only one exemption. It is silent as to express application to Indian tribes as retailers or distributors but likewise does not expressly include Indian tribes within the exemption provision.

An analysis of the act, however, reveals that the Delaware Indian Tribe's "smoke shop" in question is covered by

the act. Section 303 declares that the subject of the tax is the "sale, gift, barter or exchange of cigarettes, or the having possession of cigarettes for consumption. Section 302 levies a tax in the rates set forth therein (and as supplemented by Section 302-1) upon "the sale, use, gift, possession or consumption of cigarettes within the State of Oklahoma" and provides that the impact of the tax is on the "vendee, user, consumer or possessor of cigarettes". Section 302 further provides the tax shall be evidenced by appropriate stamps obtained from the Oklahoma Tax Commission or by a metering-impressing device authorized by the Tax Commission and such stamps or impressions shall be attached to each package of cigarettes sold. It is further provided

that the every retailer who makes sales of cigarettes within the State to persons for use or consumption shall separately show the amount of tax as evidenced by appropriate stamps on each package of cigarettes sold and the tax shall be collected by the retailer from the user or consumer.

The term "retailer" is defined by Section 301(d) to be a person who comes into possession of cigarettes for the purpose of selling or who sells them at retail. Under Section 304(b) every retailer in the State as a condition of carrying on business, shall annually secure from the Tax Commission a license and pay an annual fee therefor. The license must be displayed in the place of business which is defined as the place where orders are received or where

cigarettes are sold.

Section 305(b) of the act goes on to require every retailer who has received cigarettes from persons or by means in which the tax stamps are not affixed, or not required to be affixed, shall, within seventy-two hours (72) hours from the time such cigarettes come into his possession and before making a sale or distribution for consumption, affix the appropriate stamps thereto.

Section 305(d)(1) further provides:

> "(d)(1) All unstamped cigarettes upon which taxes are imposed by this Article which shall be found in the possession, custody, or control of any person, for the purpose of being consumed, sold or transported from one place to another in this State, for the purpose evading or violating the provisions of this Article, or with intent to avoid payment of the tax imposed hereunder, and any automobile, truck, conveyance, or other vehicle whatsoever used in the transportation of such

cigarettes, and all paraphernalia, equipment or other tangible personal property incident to the use of such purposes, found in the place, building, vehicle or vehicles, where such cigarettes are found, may be seized by any authorized agent of the Tax Commission, or any Sheriff, Deputy Sheriff, Constable or other peace officer within the State, without process; and the same shall be, from the time of such seizure, forfeited to the State of Oklahoma, and a proper proceeding filed in a Court of competent jurisdiction in the county of seizure, to maintain such seizure and prosecute said forfeiture as herein provided."

Section 306 also provides:

"It shall be unlawful for any person to sell, or display for sale, or have in his possession for consumption in this State, cigarettes on which the tax levied by this Article has not been paid, and which are not contained in packages to which are securely affixed the stamps evidencing payment of the tax. Any cigarettes so held shall be subject to seizure and sale as provided by law for sale of property under execution, and the proceeds derived from the sale thereof shall be paid to the

State Treasurer and placed in the State General Revenue Fund.

Sections 312 and 313 prescribe the records and reports which must be kept as well as the manner in which the stock of cigarettes must be maintained.

Section 315 confers the authority of determining liability for the tax on the Oklahoma Tax Commissions and to aid them in doing so confers the right to inspect any premises where cigarettes are stored, sold or offered for sale or exchange, and to examine all the records required herein to be kept or any other records that may be kept incidental to the conduct of the cigarette business of such distributory, retail dealer, or any other person dealing in cigarettes. In aid of making determinations of liability for the tax, the Tax Commission and its

agents are authorized to examine all stocks of cigarette stamps and are given the right to remain upon the premises for such length of time as may be necessary to fully determine such tax liability, and it is unlawful to fail to produce the aforesaid records or to hinder or prevent in any manner the inspection of the records or the examination of said premises.

Sections 316 and 317 set forth specific offenses and punishments with respect to the Cigarette Tax Act while Section 321 contains the only exception from tax. Section 321 provides:

> "All cigarettes sold to veterans hospitals and state operated domiciliary homes for veterans located in the State of Oklahoma, for distribution or sale to disabled ex-servicemen or disabled ex-servicewomen interned in, or inmates of, such hospitals, or residents of such homes, and all sales to the

United States are hereby exempted from the stamp excise tax levied by this Article."

Section 323 also provides:

"The sale of such exempted cigarettes shall be restricted to sales or distribution to patients or inmates of veterans hospitals and residents of state operated domiciliary homes for veterans, as shown by the records thereof, for their own personal use and consumption. Possession of twenty (20) or more of such exempted cigarettes by persons other than such inmates, patients or residents shall be deemed prima facie evidence of intention to evade payment of the stamp excise tax levied thereon, and shall be punishable as is provided by Section 305 of this Code."

A complete, plain and fair reading of the Cigarette Tax Act reveals that it is a general non-discriminatory taxation and regulatory scheme from which Indian Tribes that otherwise conduct business in a manner similar to other businesses are not exempt. Remembering the holding of

the Mescalero case that tax exemptions are not granted by implication and that if Congress intends to prevent a State from levying a general non-discriminatory tax affecting Indians, where such tax otherwise falls alike on all citizens; Congress must expressly do so. This Court cannot but otherwise reach the conclusion, the activities of the Delaware Indian Tribe disclosed by the evidence are within the purview of the Cigarette Tax Act. This conclusion is reached as a general jurisdictional proposition and does not reflect the Courts opinion as to disposition of the merits of these case [sic]. It may well be there are other matters which will be determinative of the outcome (defenses, mootness of issues, etc.).

In conclusion, it should be noted

that the Oklahoma Cigarette tax i
"remarkably similar to the state taxin
schemes considered by the United State
Supreme Court in Washington v
Confederated Tribes of the Coville [sic
Indian Reservation, et al, 100 S.Ct. 206
(1980) and Moe v. Salish and Kootena
Tribes, 425 U.S. 463, 96 S.Ct. 1634, 4
L.Ed2d 96 (1976). The Supreme Cour
noted that Washington levied a tax on th
"sale, use, consumption handling
possession or distribution" of cigarette
and that the tax stamps with dealer
required to sell only cigarettes to whic
such stamps have been affixed. The Stat
of Washington also enforced its cigarett
tax by seizing cigarettes of the India
tribes destined to be sold to non-Indian
without affixation of stamps o
collection of the tax, regarding suc

unstamped cigarettes as contraband. (100 S.Ct. at 2075)

The Court, at the outset of that portion of its decision which addressed the cigarette tax, began by citing Moe v. Salish and Kootenai Tribes, supra, and by stating in that case it considered the Montana cigarette taxing scheme which was remarkably similar to that at issue in Colville.

In the Moe case, the Court noted it upheld the tax insofar as sales to non-Indians were concerned, because its legal incidence fell on the non-Indian purchaser and upheld the collection requirement as applied to purchases by non-Indians, on the ground that it was a "minimal burden" designed to aid the State in collection of an otherwise valid tax. (100 S.Ct. at 2080)

The Supreme Court in decidin Coville [sic] went on to note particula ways in which the Moe case applied t Coville [sic]:

> "Moe establishes several principles relevant to the present cases. The State may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation. Such a tax may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians. And the State may impose at least "minimal" burdens on the Indian retailer to aid in enforcing and collecting the tax. There is no automatic bar, therefore, to Washington's extending its tax and collection and recordkeeping requirements on to the reservation in the present cases." (100 S.Ct. at 2080)

The Court in its approach, even i its statement of background and fact noted that the "federal issues" were al shrouded by "economic issues". Th following excerpts from Coville [sic

aptly summarize the Court's treatment of the issues, decision and rationale:

> "Indian tobacco dealers make a large majority of their sales to non-Indians--residents of nearby communities who journey to the reservation especially to take advantage of the claimed tribal exemption from the state cigarette and sales taxes."
>
> * * *
>
> "All parties agree that if the State were able to tax sales by Indian smoke shops and eliminate that one-dollar saving the stream of non-Indian bargain hunters would dry up. In short, the Indian retailer's business is to a substantial degree dependent upon his tax exempt status, and if he loses that status his sales will fall off sharply." (100 S.Ct. at 2069)
>
> * * *
>
> "It is painfully apparent that the value marketed by the smoke shops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. Cf. Moe v. Salish & Kootenai Tribes, supra, 425 U.S., at 475-481, 96 S.Ct., at 1642-1645; McClanahan v.

Arizona State Tax Commission, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed2d 129 (1973). What the smoke shops offer these customers and what is not available elsewhere, is solely an exemption from state taxation. The tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing customers from surrounding areas. We do not believe that principles of Federal Indian law, whether state [sic] in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." (100 S.Ct at 2082)

* * *

"The Washington Enabling Act, 25 Stat. 676, reflects an intent that the State not tax reservation lands or income derived therefrom, but the present taxes are assessed against nonmembers of the tribes and concern transactions in

personalty with no substantial connection to reservation lands." (100 S.Ct. at 2082) (a similar policy is reflected in 1 of the Oklahoma Enabling Act and Art. 1, 3 of the State Constitution)

* * *

"Washington does not infringe the right of reservation Indians to 'make their own laws and be ruled by them,' Williamms [sic] v. Lee, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959), merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving. The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other. McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 179, 93 S.Ct. 1257, 1266, 36 L.Ed.2d 129 (1973). While the Tribes do have an interest in raising revenues for essential governmental programs, ...The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is

the recipient of state services. As we have already noted, Washington's taxes are reasonably designed to prevent the tribes from marketing their tax exemption to non-members who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservations." (100 S.Ct. at 2083)

* * *

"It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes. See Moe v. Salish & Kootenai Tribes, supra, 425 U.S., at 481, n. 17, 96 S.Ct., at 1645. That clause may have a more limited role to play in preventing undue discrimination against, or burdens on, Indian commerce. But Washington's taxes are applied in a nondiscriminatory manner to all transactions within the State. And although the result of these taxes will be to lessen or eliminate tribal commerce with nonmembers, that market existed in the first place only because of a claimed exemption from these very taxes. The taxes under consideration do not burden commerce that would exist on the

reservations without respect to the tax exemption." (100 S.Ct. at 2083)

* * *

"We recognized in Moe that if a State's tax is valid, the State may impose at least minimal burdens on Indian businesses to aid in collecting and enforcing that tax. The simple collection burden imposed by Washington's cigarette tax on tribal smoke shops is legally indistinguishable from the collection burden upheld in Moe, and we therefore hold that the State may validly require the tribal smoke shops to affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sale to nonmembers of the Tribe."

* * *

"The state sales tax scheme requires smoke shop operators to keep detailed records of both taxable and nontaxable transactions."

* * *

Contrary to the District Court, we find the State's recordkeeping requirements valid in toto. The Tribes, and not the State as the District Court supposed, bear the

> burden of showing that the recordkeeping requirements which they are challenging are invalid." (100 S.Ct. 2084)
>
> * * *
>
> "Finally, the State contends that it has the power to seize unstamped cigarettes as contraband if the tribes do not cooperate in collecting the State's taxes."
>
> * * *
>
> "We find that Washington's interest in enforcing its valid taxes is sufficient to justify these seizures." (100 S.Ct. at 2085)

The defendants herein have cited the Coville [sic] case to this Court and have attempted to distinguish same by asserting that it turned on the question or issue of the State of Washington have [sic] assumed jurisdiction over Indians and Indian affairs to the extent not otherwise ousted. This Court respectfully disagrees with the

defendants on this point. This Court's reading of this case in its entirety and the Supreme Court's reliance on the Moe case and the Mescalero case, supra, compell [sic] this Court to the conclusion that the pivotal issue is the nature of the tax and the competing interests in regard thereto; that is, the State's governmental interests as opposed to the Tribe's economic interests. The Court rejected most of the tribal arguments regarding the extension of the tax on grounds of preemption, interference with self-government, etc.

Citing the Mescalero case, the Court in Coville [sic] noted State power over Indian Affairs is "considerably more expansive" outside Indian Country and reservations than it is within. (100 S.Ct. 2085)

In the instant case the Delaware Indians' "smoke shop" retail cigarette business is subject to taxation and regulation and its situs is within the jurisdiction of this Court in those regards and as regards violations of that [sic] laws and the criminal laws generally.

For the reasons stated herein the defendants plea to jurisdiction and Motion to Quash are overruled with exception and these cases are to be docketed and set for further proceedings on the merits. It is so ordered.

s/ John F. Reif
Examining Magistrate and
Special District Judge

APPENDIX F

**IN THE DISTRICT COURT OF
TULSA COUNTY
STATE OF OKLAHOMA**

No. CRM-84-1026

STATE OF OKLAHOMA, PLAINTIFF

v.

CHESTER LEE BROOKS,
A/K/A ACHISSON AMENSHI,
AND LARRY JOE BROOKS, DEFENDANTS

ORDER

This matter comes on for hearing on this 22nd day of October, 1984, on regularly scheduled setting. Plaintiff State of Oklahoma appears by Assistant District Attorney Susan K. Morgan; Defendant Chester Lee Brooks appears by his attorney; Defendant Larry Joe Brooks

appears in person and with his attorney James R. Winnie. After reviewing the Briefs filed in the case and after hearing arguments of counsel the Court finds as follows:

1) The land in question is Indian Country, belonging to members of the Creek Nation.

2) The Defendants are members of the Delaware Tribe of Indians, and, although not listed on the Tribal Rolls, have Tribal identification cards.

3) The Defendants are Indians and must be treated as such, even though their business is located on Creek Indian land and not Delaware Indian land.

4) This Court has no jurisdiction to consider allegations of criminal conduct against Indians on Indian country, and the case must be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that, based on the above and foregoing findings, this case is hereby dismissed.

Done this 9th day of November, 1984.

s/ GORDON MCALLISTER
SPECIAL DISTRICT JUDGE

APPROVED AS TO FORM:

s/ JAMES R. WINNIE
ATTORNEY FOR DEFENDANTS

s/ SUSAN K. MORGAN
ASSISTANT DISTRICT ATTORNEY
ATTORNEY FOR PLAINTIFF

APPENDIX G

Constitutions of Wyoming, New Mexico, Arizona, Montana, South Dakota, Washington, and North Dakota.

WYOMING CONSTITUTION

Art. 21, §26

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§26. Ownership of certain lands disclaimed; restriction on taxation of nonresidents.

The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the

disposition of the United States and that said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; that the lands belonging to the citizens of the United States residing without this state shall never be taxed at a higher rate than the lands belonging to residents of this state; that no taxes shall be imposed by this state on lands or property therein, belonging to, or which may hereafter be purchased by the United States, or reserved for its use. But nothing in this article shall preclude this state from taxing as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person, a title thereto, by patent or other grant, save

and except such lands as have been or ma
be granted to any Indian or Indians unde
any acts of congress containing
provision exempting the lands thu
granted from taxation, which las
mentioned lands shall be exempt fro
taxation so long, and to such an extent
as is, or may be provided in the act o
congress granting the same.

CONSTITUTION OF NEW MEXICO

Art. XXI, §2

Sec. 2. [Control of unappropriated or Indian lands; taxation of federal government, nonresident and Indian property.]

The people inhabiting this state d
agree and declare that they foreve
disclaim all right and title to th
unappropriated and ungranted public land

lying within the boundaries thereof, and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; and that the lands and other property belonging to citizens of the United States residing without this state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by this state upon lands or property therein belonging to or which may hereafter be

acquired by the United States or reserved for its use; but nothing herein shall preclude this state from taxing as other lands and property are taxed, any lands and other property outside of an Indian reservation, owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any act of congress; but all such lands shall be exempt from taxation by this state so long and to such extent as the congress of the United States has prescribed or may hereafter prescribe.

CONSTITUTION OF ARIZONA

Art. 20

Fourth. Public lands; Indian lands

Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

Fifth. Taxation

Fifth. The lands and other property belonging to citizens of the United

States residing without this State shall never be taxed at a higher rate than the lands and other property situated in this State belonging to residents thereof, and no taxes shall be imposed by this State on any lands or other property within an Indian Reservation owned or held by any Indian; but nothing herein shall preclude the State from taxing as other lands and other property are taxed, any lands and other property outside of an Indian Reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any act of Congress.

CONSTITUTION OF MONTANA

ARTICLE I
COMPACT WITH THE UNITED STATES

All provisions of the enabling act of Congress (approved February 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the state of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana.

ORDINANCE NO. I
FEDERAL RELATIONS

Be It Ordained: First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of the state of Montana shall ever be molested in person or property, on account of his or her mode of religious worship.

Second. That the people inhabiting the said proposed state of Montana, do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the

congress of the United States, that the lands belonging to citizens of the United States, residing without the said state of Montana, shall never be taxed a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the said state of Montana on lands or property therein belonging to, or which may hereafter be purchased by the United States or reserved for its use. But nothing herein contained shall preclude the said state of Montana from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of

congress containing a provision exempting the lands thus granted from taxation, but said last named lands shall be exempt from taxation by said state of Montana so long and to such extent as such act of congress may prescribe.

SOUTH DAKOTA CONSTITUTION

Art. XXII

The following article shall be irrevocable without the consent of the United States and the people of the state of South Dakota expressed by their legislative assembly:

Second. That we, the people inhabiting the state of South Dakota, do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundary of

South Dakota, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands belonging to residents of this state; that no taxes shall be imposed by the state of South Dakota on lands or property therein belonging to or which may hereafter be purchased by the United States, or reserved for its use. But nothing herein shall preclude the

state of South Dakota from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relation and has obtained from the United States, or from any person a title thereto by patent or other grant save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation. All such lands which may have been exempted by any grant or law of the United States, shall remain exempt to the extent, and as prescribed by such act of Congress.

CONSTITUTION OF WASHINGTON

ARTICLE XXVI

COMPACT WITH THE UNITED STATES

The following ordinance shall be irrevocable without the consent of the United States and the people of this state:-

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and

remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use: Provided, That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title

thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.

NORTH DAKOTA CONSTITUTION

ARTICLE XIII
COMPACT WITH THE UNITED STATES

The following article shall be irrevocable without the consent of the United States and the people of this state:

Section 1.

1. Perfect toleration of religious sentiment shall be secured, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.
2. The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and that said Indian lands shall remain under the absolute jurisdiction and

control of the Congress of the United States, provided, however, that the legislative assembly of the state of North Dakota may, upon such terms and conditions as it shall adopt, provide for the acceptance of such jurisdiction as may be delegated to the state by Act of Congress; that the lands belonging to citizens of the United States residing without this state shall never be taxed at a higher rate than the lands belonging to residents of this state; that no taxes shall be imposed by this state on lands or property therein, belonging to, or which may hereafter be purchased by the United States or reserved for its use. But nothing in this article shall preclude this state from taxing as other lands are

taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person, a title thereto, by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any Acts of Congress containing a provision exempting the lands thus granted from taxation, which last mentioned lands shall be exempt from taxation so long, and to such an extent, as is, or may be provided in the Act of Congress granting the same.

Supreme Court, U.S.
FILED
MAR 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1147

In The

Supreme Court of the United States

October Term, 1988

STATE OF OKLAHOMA,

Petitioner,

vs.

CHESTER LEE BROOKS, A/K/A
ACHISSON AMENSHI AND
LARRY JOE BROOKS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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18pp

QUESTION PRESENTED

Whether the State of Oklahoma has jurisdiction to prosecute two Native Americans for crimes alleged to have been committed in Indian Country as defined by 18 U. S. C. Section 1151 (c)?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATEMENT

Respondents oppose the Petition as there is no reasons for further review of this matter. The decision below is in accord with well established and settled law.

Respondents, with the exceptions noted herein, agree with the "Nature of the Controversy" (Petition, pp. 4-7) and "Proceedings Below" (Petition pp. 7-14) and those

portions of the Petition will serve as Respondents' Statement of the Case. The exceptions noted follow.

Petitioner believes this case to be parallel with *Muscogee (Creek) Nation v. Hodel,* 851 F. 2d 1439 (D. C. Cir. 1988), Cert Den. *Hodel v. Muscogee (Creek) Nation,* January 9, 1989 No. 88-798, and *State v. Klindt,* No. S-84-781, pending on rehearing before the Court below. *Hodel* now final is authority holding that the Muscogee (Creek) Nation has the power to establish Tribal Courts and Law Enforcement Agencies in recognition of the Nations jurisdiction and its own Indian Country. *Klindt* could well turn on the fact that neither the committing magistrate nor the District Court on Appeal made specific findings that he was of Native American or Indian blood. Petitioner agrees in footnote 3, page 5 of its Petition. Such a finding is, of course implicit, but the Court below may well use *Klindt* to specify how proof is to be made of Indian blood, and how the Courts below should make such findings, and what, if any further record is necessary for appeal. The cases all involve state criminal prosecutions in Indian Country, but otherwise are unrelated.

The *amicus* seems to suggest some relationship in these cases. The United States makes a broad statement in the "Interest" portion of its brief (p 1) of the supposed unsettling nature on the three United States Attorneys in Oklahoma and upon the District Attorneys of 40 counties within the State as to the jurisdiction to prosecute Indians for crimes in Indian Country. (While Respondents' counsel are also of Native American blood and are sensitive to the preference for the term "Native American" they use the term "American Indian" or "Indian" herein, as the appellation is so well engrained in the jurisprudence.)

The statement is illusory and untrue. The United States Attorneys in all portions of Oklahoma regularly prosecute Indians for crimes committed in Indian Country.

Respondents believe that only the Petitioner and the former District Attorneys of the Ottawa and Delaware Counties District believe there to be any question as to criminal jurisdiction in Indian Country. These District Attorneys are parties to civil actions brought by Tribes in the United States District Court for the Northern District of Oklahoma. They are presently enjoined from attempting to execute state process or commence criminal actions in the affected Indian Country by that Court. *Indian Country USA, Inc. v. Oklahoma Tax Commission*, 829 F.2d 967, 970 (10th Cir. 1987), Cert. den. *Oklahoma Tax Comm. v. Muscogee (Creek) Nation*, June 27, 1988, No. 88-1068. That case, wherein Petitioner was enjoined, resolves the issues propounded by both Petitioner and *amicus*. The Ottawa-Delaware County District Attorney is enjoined in #85-C-639 B (unreported) in the Northern District of Oklahoma, appeal docketed, #86-1885 (10th Cir., June 6, 1986.)

Both Petitioner and *amicus* refer to civil and criminal jurisdiction in Indian Country in their filings here. No civil law questions are involved. This case is an appeal from a motion holding that the State does not have jurisdiction to prosecute criminal violations of its tax acts allegedly committed in Indian Country by Indians. This case is a criminal procedure case.

ARGUMENT

Petitioner and *amicus* seek a Writ of Certiorari and review of the decision below to change long established and well settled law dispositive of this case. They assert criminal jurisdiction for the State without compliance with P. L. 83-280, 25 U. S. C. §§ 1321, et seq., by judicial fiat. They ask this Honorable Court to declare that Indians of different tribes than the owners of Indian Country are prosecutable in State Courts, despite the clear Congressional mandates. Petitioner and *amicus* seek reinstatement of *Ex Parte Nowabbi*, 61 P.2d 1139 (Okl. Cr. 1936). *Nowabbi* was overruled or superseded by later amendment of the definition of Indian Country. *Nowabbi* has been ignored by the Oklahoma Courts and the United States District Courts and Court of Appeals for the Tenth Circuit.

THE STATE OF OKLAHOMA HAS NO JURISDICTION OF CRIMES COMMITTED BY AN INDIAN IN INDIAN COUNTRY

The Respondents' smokeshop, the *locus in quo*, was located on lands leased from fee owners who are Muscogee (Creek) Indians. The respondents are Delaware Indians. (Appendix A, page 4a, Petition).

The Congress has clearly defined the Indian Country over which it retains exclusive jurisdiction as:

> " . . . (c) All Indian allotments, the Indian titles to which have not been extinguished. . . ." 18 U. S. C. § 1151.

The United States, by the Constitution, has supreme and exclusive jurisdiction over all matters involving the American Indian. *United States Constitution,* Article I Section 8, clause 3, Article II Section 2, clause 2 and Article VI clause 2. *Worcester v. Georgia,* 31 U. S. 515 (1832); *Menominee Tribe v. United States,* 391 U. S. 404 (1968); *Antoine v. Washington,* 420 U. S. 194 (1974); *Montana v. Blackfeet Tribe of Indians,* 471 U. S. 759 (1985); *Cheyenne-Arapaho Tribes of Oklahoma v. State of Oklahoma,* 618 F.2d 665 (10th Cir. 1980), *Indian Country USA, supra.*

The Court of Criminal Appeals below previously announced the rule that Indians are not subject to State Court prosecution for crimes committed in Indian Country. *State v. Littlechief,* 573 P. 2d 263 (Okl. Cr. 1978); *C. M. G. v. State,* 594 P. 2d 798 (Okl. Cr. 1979); *State v. Burnett,* 671 P. 2d 1165 (Okl. Cr. 1983); *United States v. Burnett,* 777 F. 2d 593 (10th Cir. 1985) (The same case in Federal Court); *Cheyenne-Arapaho* and *Indian Country, USA,* both *supra.* The Court follows its rule here.

Quoting from *Burnett,* the following is most instructive:

> "The issue in this Rule VI appeal is whether restricted Osage allotment land is Indian Country under federal law. We find that it is; and affirm the magistrate's order dismissing state murder charges arising out of a slaying on such land." Id., at page 1136.
>
> [P. L. 83-280] . . . "passed in 1968, grants to the States consent to assume, with the consent of the Indians involved, jurisdiction to prosecute crimes committed in Indian Country . . .
>
> "However, the State's assertion that the alleged exercise of jurisdiction by individual law enforcement

> officers and court officials constitutes a binding election is unpersuasive. The states must 'manifest by political action their willingness and ability to discharge their new responsibilities' in order to make effective the assumption of jurisdiction. . . ."

– Id., at page 1167.[1]

The Attorney-General of Oklahoma is in accord. Opinion 87-176. 10 *Opinions of the Attorney General* 464.

Petitioner and *amicus* seek certiorari to revive *Ex Parte Nowabbi, supra.* They assert that *Nowabbi* should be followed as the Court below did not mention it in its opinions in *Littlechief, C. M. G.,* or *Burnett.* They argue that it has been revived because the Court below overruled the case in its original opinion, but did not mention it in its opinion on rehearing. *Nowabbi* is contra to all the cited cases.

Nowabbi was decided in 1936, prior to the dispositive amendment of the Federal Criminal Code adding the third category of Indian Country. See Cohen, *Handbook of Federal Indian Law,* (1982 Rev.) pages 777 through 789, and accompanying notes. Cohen's authoritative *Handbook* was originally published in 1942 prior to that amendment. It was revised and republished in 1982. The latter edition leaves no doubt that *Nowabbi* is not the law. Petitioner and *amicus* cite the original 1942 edition of Cohen as authority. The revised edition, cited by Respondents, the Oklahoma Supreme Court and the 10th Circuit correctly states the law. *State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma,* 711 P. 2d 77 (Okl. 1985) and *Indian Country,*

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[1] An extensive quotation from *Burnett* showing the Court of Criminal Appeals reasoning and that it followed the law to the letter is in Appendix A.

USA, supra. The demise of *Nowabbi* is found in footnote 17 referring to footnote 16 of *Seneca-Cayuga,* Id., 81, 82.[2] *Nowabbi* simply is no longer the law.

Petitioner and *amicus* argue that the court below erred in not holding that Delaware Indians in Creek Indian Country are prosecutable in State Court. This argument is not the law, nor does it reflect error below. The decision below is amply supported by case law. Oklahoma has not complied with PL 83-280.

Petitioner argues that Oklahoma's Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 367, granted the State complete jurisdiction over Indian Country. This argument has been litigated before and resolved adversely to Petitioner. See *Indian Country, USA, supra* at pages 979 and 980.

The Court of Appeals for the Tenth Circuit held:

> "The language of the Oklahoma Act, read in its historical context, suggests that Congress intended to preserve its jurisdiction and authority over Indians and their lands in the new State of Oklahoma until it accomplished the eventual goal of terminating the tribal governments, assimilating the Indians, and dissolving completely the tribally owned land base – events that never occurred and goals that Congress later expressly repudiated. . . ." *Indian Country, USA, supra,* at page 979.

This Honorable Court denied Certiorari in that case leaving the decision against Petitioner standing in *Indian*

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[2] The text of the footnotes are in Appendix B. Respondents note the correctness of the Court's holding concerning *Nowabbi.* The decision on jurisdiction is not the law, and is not binding on the Court of Criminal Appeals.

Country, USA. The law is clear and has been decided in the Court of Appeals.

CONCLUSION

The Oklahoma Court of Criminal Appeals decided this case correctly by any reasonable standard of legal philosophy. The decision is amply supported by the Court's own prior decisions, by the decisions of the United States District Courts in Oklahoma and by the Courts of Appeals for the Tenth and District of Columbia Circuits. The decision is consonant with the controlling Acts of Congress. Petitioner and *Amicus* seek review by Certiorari to overturn long established settled law. Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

State v. Burnett, 671 P. 2d 1165, 1166, 1167, 1168 (Okl. Cr. 1983):

"The issue on this Rule VI appeal is whether restricted Osage allotment land is Indian Country under federal law. We find that it is; and affirm the magistrate's order dismissing state murder charges arising out of a slaying on such land." (Id., at page 1166.)

" 'Indian Country' for our purposes, means 'all Indian allotments, the Indian titles to which have not been extinguished' . . . " (Citing 18 U.S.C. Section 1151 (c) and cases). (Id., at page 1166.)

"Federal law permits states such as Oklahoma to assume jurisdiction over Indian lands. However, affirmative action is required to effectuate the assumption of jurisdiction.

Title 25 U.S.C. §1321 ¶ (a), (1970) passed in 1968, grants to the states consent to assume, with the consent of the Indians involved, jurisdiction to prosecute crimes committed in Indian Country, and 25 U.S.C. §1323 (1970), gives the consent of the United States to states to amend their constitutions or existing statutes to remove any legal impediments to the state assuming that jurisdiction. To date, the State of Oklahoma had made no attempt to repeal Art. I, §3, of the Constitution of the State of Oklahoma, which prohibits state jurisdiction over Indian Country, so the federal government still has exclusive jurisdiction over Indian Country located within Oklahoma boundaries. See *State v. Littlechief*, Okl. Cr., 573 P.2d 263 (1978).

"*C.M.G. v. State*, 594 P.2d at 799. A state constitutional amendment may not be necessary under subsequent federal case law. *Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 493, 99

S.Ct. 740, 757, 53 L.Ed. 2d 740 (1979). However, the State's assertion that the alleged exercise of jurisdiction by individual law enforcement officers and court officials constitutes a binding election is unpersuasive. The states must "manifes(t) by political action their willingness and ability to discharge their new responsibilities' " in order to make effective the assumption of jurisdiction. Id., at 486, 99 S.Ct. at 754, Note 30, quoting from *Kennerly v. District Court of Montana,* 400 U.S. 423, 91 S.Ct. 480, 27 L.Ed.2d 507 (1971). An assumption of jurisdiction over the Indian Country could involve considerable burdens. *Williams v. Lee,* 358 U.S. 217, 223, 79 S.Ct. 269, 272, 3 L.Ed.2d 251 (1959), and thus far, no one with the right and power to speak for and bind Oklahoma has done so." (Id., at pages 1167 and 1168.)

The Court concluded:

"The land in question is 'Indian Country' within the meaning of 18 U.S.C. §1151 (c) (1976), and outside the jurisdiction of the District Court . . . " (Id., at page 1168.)

APPENDIX B

State ex rel May v. Seneca-Cayuga Tribe of Oklahoma, 711 P. 2d 77, 81, 82 (Okl. 1985):

To the extent that extant Oklahoma case law may be construed to reach a contrary conclusion, it is hereby disapproved and withdrawn.[17]

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[17] *Ex parte Nowabbi, supra* note 16 at 1153 through 1156; Oklahoma Attorney's General Opinion No. 79-216, *supra* note 16. *Ex parte Nowabbi, supra* note 16, holding that Oklahoma could take jurisdiction over crimes committed by Indians in Indian Country, on which the Attorney's General Opinion relies, is based on pre-1948 law. The 1948 revised United States Code includes revisions found at 18 U.S.C. § 1151 (defining Indian Country) and § 1153 (The Major Crimes Act vesting jurisdiction in the United States for major crimes, e.g., murder, discussed in *Nowabbi, supra* note 16). Since enactment of the 1948 code, courts have been reluctant to exclude the lands of eastern Oklahoma tribes from application of federal law. See, e.g., *United States v. John*, 437 U.S. 634, 648 through 652, 98 S.Ct. 2541, 2548 through 2550, 57 L.Ed.2d 489 [1978] (federal law under the Major Crimes Act applied to Choctaws in Mississippi). For a thoughtful analysis of the *Nowabbi* decision and reasons to exclude it as a basis of state jurisdiction, see Cohen, *supra* note 16 at 777 through 780 and accompanying notes.

[16] Because the State argues that *all* tribes in Indian Territory were disestablished by a series of events culminating in Oklahoma statehood, citing as authority *Ex parte Nowabbi*, 60 Okl.Cr., 111, 61 P.2d 1139 [1936] and Oklahoma Attorney's General Opinion No. 79-216 [December 31, 1979], we note briefly the history of the Five Civilized Tribes in comparison with the tribes of the Quapaw Indian Agency. Most of the historical references derive from the excellent sketches in *Harjo v. Kleppe*, 420 F.Supp. 1110 [D.C. 1976], *aff'd. sub nom, Harjo v. Andrus*, 581 F.2d 949 [D.C.Cir.1978] (hereinafter referred to as

(Continued on following page)

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Harjo v. Kleppe), and in F. Cohen, Handbook of Federal indian Law, 770 through 784 [1982 ed.]. The Five Civilized Tribes (Creek, Cherokee, Seminole, Choctaw and Chickasaw) came to Oklahoma following the Indian Removal Act of 1830. *Harjo v. Kleppe, supra* at 1119. Before the Civil War, these tribes owned most of the present-day Oklahoma, but because of their alliance with the Confederacy, were penalized by forced cession of their western lands to the federal government. Their remaining lands came to be known as "Indian Territory". *Harjo v. Kleppe, supra.*

Increasing white settlement had created a demand for allotment of Indian lands, resulting in passage of the "Indian General Allotment Act" (also known as "The Dawes Act" or the "Dawes Severalty Act"). Act of February 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 et seq. [1982]). The purpose of the Act was to distribute tribal lands to reservation Indians for eventual resale to white settlers. Although individual allottees were subject to state or territorial laws (both civil and criminal), after the issuance of trust patents the Act was amended in 1906 to postpone such jurisdiction until the trust period expired and fee simple patents were issued. Act of May 8, 1906, ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349 [1982]). See *Ahboah v. Housing Authority of the Kiowa Tribe,* Okl., 660 P.2d 625, 628 [1983]. The Act exempted the lands of the Five Civilized Tribes, but the tribes of the Quapaw Indian Agency came within the terms of the Act and their lands were allotted at that time or shortly thereafter. *Harjo v. Kleppe, supra* at 1121 through 1122. (Note that the Quapaw Tribe, which had resisted the allotment policy, by tribal action allotted their own lands in 1893 and received congressional approval in 1895). See footnote 11 *supra.*

With the creation of Oklahoma Territory in 1890 (Organic Act), the Five Civilized Tribes and the tribes of the Quapaw Agency were exempted as the unorganized Indian Territory under concurrent federal and tribal jurisdiction. Act of May 2, 1890,

(Continued on following page)

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ch. 182, § 1, 26 Stat. 81. Because of frequent disputes between the Indian tribes and white settlers (who were rapidly growing in number), in 1895 Indian Territory was divided into three judicial districts, with federal jurisdiction (both civil and criminal) over United States citizens, and in mixed cases over tribal citizens. These federal courts were to apply Arkansas law in the absence of federal statute. *Harjo v. Kleppe, supra* at 1121.

With the Appropriations Act of June 7, 1897, ch. 3, 30 Stat. 62, federal law was extended to include Indians in Indian Territory, although tribal legislation was still recognized subject to Presidential approval or veto. Mention of the tribes of the Quapaw Indian Agency is omitted from the Appropriations Act. *Harjo v. Kleppe, supra* at 1121. Major legislation following the Appropriations Act of 1897 also omitted the tribes of the Quapaw Agency and dealt specifically with the Five Civilized Tribes. Organic Act of May 2, 1890, *supra* (creation of Oklahoma Territory); Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 267 (providing for Oklahoma statehood).

The Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495 (providing for forced allotments of lands held by the Five Civilized Tribes and termination of tribal status), finally rendered tribal law unenforceable in federal court, and the pre-existing tribal courts were abolished. Allotments for the Five Civilized Tribes were then completed by a series of congressional enactments. *Harjo v. Kleppe, supra* at 1121 through 1122.

(3)

Supreme Court, U.S.
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No. 88-1147

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF OKLAHOMA, PETITIONER

v.

CHESTER LEE BROOKS, AKA ACHISSON AMENSHI, AND LARRY JOE BROOKS

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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3588

QUESTION PRESENTED

Whether the State of Oklahoma has jurisdiction to prosecute respondents, who are members of the Delaware Tribe of Indians, for violating the State's tax and record-keeping laws in connection with respondents' sales of cigarettes to both Indians and non-Indians on a restricted allotment leased from a member of the Creek Nation.

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In the Supreme Court of the United States

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No. 88-1147

STATE OF OKLAHOMA, PETITIONER

v.

CHESTER LEE BROOKS, AKA ACHISSON AMENSHI, AND LARRY JOE BROOKS

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The interest of the United States arises out of its special relationship with Indian tribes and the need to clarify the respective jurisdictions of the United States and the State of Oklahoma on individually owned restricted Indian lands within the portion of eastern Oklahoma that formerly constituted the territory of the Five Civilized Tribes. The United States Attorneys and the district attorneys of 40 counties in Oklahoma are unsure, in light of recent judicial decisions, which sovereign has jurisdiction to prosecute Indians for offenses committed on these Indian lands. Because of these interests, the United States filed a brief as amicus curiae in support of the State in the Oklahoma Court of Criminal Appeals.

STATEMENT

In the late 19th Century, the Five Civilized Tribes[1] occupied most of the land in the Indian Territory, which now comprises eastern Oklahoma. In preparation for the admission of Oklahoma to the Union, Congress passed a number of statutes that contemplated the elimination of the Tribes' governmental powers, provided for the allotment of their lands, and subjected members of the Tribes to the full criminal and civil jurisdiction of the State, even on trust or restricted lands. Oklahoma has exercised that jurisdiction over Indians. See *Ex parte Nowabbi*, 61 P.2d 1139, 1156 (Okla. Crim. App. 1936) (sustaining state jurisdiction over murder of Choctaw Indian by another Choctaw Indian on restricted allotment). In this case, however, the Oklahoma Court of Criminal Appeals held that the State may not tax or impose record-keeping requirements on sales of cigarettes by Indians to other Indians on the restricted allotment of a member of the Creek Nation. This ruling is inconsistent with the long-held understanding that actions by Indians on Indian allotments within the former territory of the Five Civilized Tribes are subject to the civil and criminal jurisdiction of the State to the same extent as if they involved non-Indians and occurred on non-Indian land.

A. The Jurisdictional History of the Indian Territory

1. In the 1830s, the Five Civilized Tribes were removed from their homelands in the southeastern United States to the then-unsettled region west of Arkansas, in what is now the State of Oklahoma. In various removal treaties, the Five Civilized Tribes were granted their new land in fee simple, with the right of perpetual self-government. *Atlan-*

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[1] The "Five Civilized Tribes" are the Creek (Mūscogee), Choctaw, Chickasaw, Seminole and Cherokee Tribes.

tic & Pac. R.R. v. *Mingus*, 165 U.S. 413, 436-437 (1897); Cohen, *Handbook of Federal Indian Law* 426-427 (1942). After the Civil War, the Five Tribes ceded the western portion of their territory, but their right of self-government was once again affirmed. Treaty with the Seminole Indians, Mar. 21, 1866, art. VII, 14 Stat. 758; Treaty with the Choctaw and Chickasaw Indians, Apr. 28, 1866, art. VIII, 14 Stat. 772; Treaty with the Creek Indians, June 14, 1866, art. X, 14 Stat. 788; Treaty with the Cherokee Indians, July 19, 1866, art. XII, 14 Stat. 802.

Over time, law enforcement became a problem in the area that the Five Tribes retained because the tribal courts did not have jurisdiction over the increasing number of non-Indian residents. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 197-200 (1978); Cohen, at 427. In response, Congress, in the Act of March 1, 1889, ch. 333, § 1, 25 Stat. 783, created a "United States court" having exclusive jurisdiction over "all offenses against the laws of the United States committed within the Indian Territory" that were not punishable by death or imprisonment at hard labor (§ 5, 25 Stat. 783; see note 2, *infra*) and over certain civil cases (§ 6, 25 Stat. 784).

In the Act of May 2, 1890, ch. 182, 26 Stat. 81, Congress established the Territory of Oklahoma in the western portion of the Indian Territory, which previously had been ceded by the Five Tribes (§§ 1-28, 26 Stat. 81-93), and expanded the jurisdiction of the United States court in the diminished Indian Territory (§§ 29-44, 26 Stat. 93-100). The civil jurisdiction of the court was extended to all civil suits excepts those over which the tribal courts had exclusive jurisdiction (§ 29, 26 Stat. 93-94; see also § 36, 26 Stat. 97). The 1890 Act also provided that the general laws of the United States that prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States "shall have the same force

and effect in the Indian Territory as elsewhere in the United States" (§ 31, 26 Stat. 96). The criminal laws of Arkansas (with certain exceptions) were extended to the Indian Territory for offenses not governed by federal law (§ 33, 26 Stat. 96-97). See Cohen, at 427-428.[2] However, the 1890 Act expressly did not deprive the courts of the Five Tribes of their "exclusive jurisdiction" over all cases in which tribal members were the "sole parties" and did not interfere with their right to punish members for the violation of tribal laws that were not contrary to treaties and laws of the United States (§ 31, 26 Stat. 96).

Before long, however, Indians were brought under the same jurisdictional and substantive laws that applied to non-Indians in the Indian Territory. First, the Indian Department Appropriations Act of 1897, ch. 3, 30 Stat. 62, vested the United States courts in the Indian Territory with "exclusive jurisdiction" to try "all civil causes in law and equity" and "all criminal causes" for the punishment of offenses by "any person" in the Indian Territory after January 1, 1898 (§ 1, 30 Stat. 83). The 1897 Act also made the laws of the United States and Arkansas then in force in the Indian Territory applicable to "all persons therein, irrespective of race" (§ 1, 30 Stat. 83). Second, Section 28 of the Curtis Act (Act of June 28, 1898, ch. 517, 30 Stat. 495, 504-505) abolished all tribal courts in the Indian Territory,[3]

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[2] Where offenses against the laws of the United States were punishable by death or imprisonment at hard labor, the circuit and district courts for the Western District of Arkansas and the Eastern District of Texas continued to exercise exclusive jurisdiction (§ 33, 26 Stat. 96-97), as they had before (Act of Mar. 1, 1889, ch. 333, §§ 17, 18, 25 Stat. 786-787; *Oliphant*, 435 U.S. at 200 & n. 10). The jurisdiction of those courts subsequently was transferred to the United States court for the Indian Territory by Section 9 of the Act of March 1, 1895, ch. 145, 28 Stat. 693, 697.

[3] The effective date of Section 28 of the Curtis Act was postponed until October 1, 1898, as regards the Chickasaw, Choctaw and Creek

and Section 26 of that Act provided that "the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory" (30 Stat. 504). Third, in the Act of April 28, 1904, Congress once again provided that "[a]ll the laws

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Tribes (30 Stat. 504, 505), in order to afford those Tribes an opportunity to ratify allotment agreements with the United States that had been negotiated with the Commission to the Five Civilized Tribes (known as the Dawes Commission) and that were set forth, as amended, in the Curtis Act itself. See §§ 29, 30, 30 Stat. 505-519. The Act provided that if the Tribes ratified the agreements, the Curtis Act would apply to those Tribes only to the extent it did not conflict with the agreements (§§ 29, 30, 30 Stat. 505, 514). The Choctaw and Chickasaw Nations ratified their joint agreement, which retained the exclusive jurisdiction of the United States courts in the Indian Territory over cases involving real estate and certain enumerated offenses, "without reference to race" (§ 29, 30 Stat. 511), but apparently permitted the tribal courts to exercise concurrent jurisdiction in other matters solely involving members of the Tribes. The Seminole Nation entered into a separate agreement (Act of July 1, 1898, ch. 542, 30 Stat. 567), which conferred exclusive jurisdiction on the United States court for the Indian Territory in certain civil and criminal cases "without reference to race or citizenship," but otherwise provided that "the courts of said nation shall retain all the jurisdiction which they now have" (30 Stat. 569).

The Creek Nation did not ratify the agreement that had been negotiated with the Dawes Commission, but it later entered into a different agreement. See Act of March 1, 1901, ch. 676, 31 Stat. 861, as supplemented by the Act of June 30, 1902, ch. 1323, 32 Stat. 500. That agreement provided that it was not to "be construed to revive or reestablish the Creek courts which have been abolished by former Acts of Congress" (§ 47, 31 Stat. 873). (In *Muscogee (Creek) Nation* v. *Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), cert. denied, No. 88-798 (Jan. 9, 1989), the court held that the authority of the Creek Nation to establish tribal courts was reinstated by Section 3 of the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. 503.) The Cherokee Nation had refused to negotiate even a ~~ten~~tative agreement with the Dawes Commission, but it entered into an agreement in 1901 that likewise declined to revive the tribal courts. Act of Mar. 1, 1901, ch. 675, § 72, 31 Stat. 859.

of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise" (ch. 1824, § 2, 33 Stat. 573). See *Stewart* v. *Keyes*, 295 U.S. 403, 409 (1935). "Thus the congressional enactments gradually came to the point where they displaced the tribal laws and put in force in the Territory a body of laws adopted from the statutes of Arkansas and intended to reach Indians as well as white persons" (*Marlin* v. *Lewallen*, 276 U.S. 58, 62 (1928)).

The allotment agreements with the Five Tribes contemplated that the tribal governments would cease to exist by March 4, 1906. However, in light of difficulties in the enrollment and allotment process, as well as Indian resistance to that process, the tribal governments were extended indefinitely in 1906. See Jt. Res. No. 7 of Mar. 2, 1906, 34 Stat. 822; Five Tribes Act of Apr. 26, 1906, ch. 1876, § 28, 34 Stat. 137, 148; *Harjo* v. *Kleppe*, 420 F. Supp. 1110, 1118-1131 (D.D.C. 1976), aff'd, 581 F.2d 949 (D.C. Cir. 1978). Nevertheless, all tribal taxes were abolished as of December 31, 1905 (§ 11, 34 Stat. 141). This then, was the state of affairs when Congress considered the admission of Oklahoma to the Union in 1906.

2. The Act of June 16, 1906, ch. 3335, 34 Stat. 267, authorized the creation of the State of Oklahoma out of the Oklahoma and Indian Territories. Section 16 of the Enabling Act, 34 Stat. 276, provided that cases arising under federal law that were then pending in the district courts of the Oklahoma Territory and in the United States courts in the Indian Territory were to be transferred to the newly created United States District Courts for the Western and Eastern Districts of Oklahoma, respectively. Under Section 20 of the Enabling Act, 34 Stat. 277, all cases pending in the district courts of the Oklahoma Territory and the United States courts in the Indian Territory

that were not transferred to the new federal district courts—*i.e.*, cases of a local nature—were transferred to the courts of the State of Oklahoma. See *Southern Surety Co.* v. *Oklahoma*, 241 U.S. 582 (1916). In addition, the laws of the Oklahoma Territory were extended to the Indian Territory, until the new legislature of Oklahoma should provide otherwise. §§ 2, 13 & 21, 34 Stat. 268, 275, 277-278. See *Stewart* v. *Keyes*, 295 U.S. at 409-410; *Jefferson* v. *Fink*, 247 U.S. 288, 292-293 (1918).[4]

3. In *Ex parte Nowabbi*, 61 P.2d 1139 (1936), the Oklahoma Court of Criminal Appeals held that the State of Oklahoma has jurisdiction to prosecute an Indian for a crime committed against another Indian on a restricted

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[4] Congress also passed a number of statutes after statehood that subjected the lands of members of the Five Tribes to state jurisdiction and relaxed federal restrictions on such lands. For example, in the Act of May 27, 1908, ch. 199, 35 Stat. 312, Congress eliminated all restrictions on alienation of allotments of persons having less than one-half Indian blood and permitted alienation of all but a 40-acre homestead for allottees having between one-half and three-quarters Indian blood. See *Stewart* v. *Keyes*, 295 U.S. at 411-412, 415. In the Act of June 14, 1918, ch. 101, 40 Stat. 606, Congress vested the state courts with jurisdiction over the lands of allotted members of the Five Tribes in heirship proceedings and subjected the lands of full-blood members to state laws governing the partition of real property. See *Shade* v. *Downing*, 333 U.S. 586 (1948); *United States* v. *Hellard*, 322 U.S. 363 (1944). Section 1 of the Act of April 12, 1926, ch. 115, 44 Stat. 239, provided that restrictions on allotments were removed upon death, but that a full-blood member could convey inherited or devised restricted land only with the permission of the state court having jurisdiction over the estate. Section 2 of the 1926 Act, 44 Stat. 240, made the state statutes of limitations applicable to restricted Indians of the Five Tribes and their heirs and grantees. In 1947, Congress confirmed that all restrictions on lands belonging to members of the Fives Tribes were to be removed upon the death of the original owner, but required state court approval of alienation if the heir was of one-half or more Indian blood. Act of Aug. 4, 1947, ch. 458, § 1, 61 Stat. 731.

allotment in the original territory of the Five Civilized Tribes in eastern Oklahoma.[5] The Secretary of the Interior—after an exhaustive study of the relevant statutes, including the Indian Department Appropriations Act of 1897 and the Curtis Act—likewise took the position in a letter to the Attorney General dated August 17, 1942, that the State has jurisdiction over the conduct of Indians on restricted allotments of the Five Civilized Tribes (App., *infra*, 1a-5a). That position was reaffirmed in a letter from the Secretary to the Attorney General dated March 27, 1963 (App., *infra*, 6a-9a).

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[5] The State would have been without jurisdiction under the usual rules applicable to "Indian country," which is now defined to include not only lands within an Indian reservation, but also trust or restricted allotments, whether or not within the boundaries of a reservation. See 18 U.S.C. 1151; *United States* v. *Ramsey*, 271 U.S. 467 (1926); *United States* v. *Pelican*, 232 U.S. 442, 449-450 (1914). Under the usual rules, in the absence of an Act of Congress specifically conferring jurisdiction on the State (such as the special Oklahoma statutes discussed in the text or Public Law 280, 18 U.S.C. 1162), a State has no jurisdiction over a crime committed by an Indian in Indian country. If the crime is committed by an Indian against a non-Indian or by a non-Indian against an Indian, the federal government has jurisdiction under 18 U.S.C. 1152. The second paragraph of 18 U.S.C. 1152 makes clear that it does not apply to offenses by one Indian against the person or property of another Indian or by an Indian who has been punished by the Tribe. However, Congress separately conferred federal jurisdiction over certain "major crimes" committed by an Indian. 18 U.S.C. 1153. The Tribe also has jurisdiction over crimes committed by an Indian. Where the victim is also an Indian, the jurisdiction of the Tribe ordinarily is exclusive, unless the offense falls within the Major Crimes Act. On the other hand, where both the perpetrator and victim are non-Indians, the State has exclusive jurisdiction. *United States* v. *McBratney*, 104 U.S. 621 (1881).

B. The proceedings in this case

1. Respondents Chester Lee Brooks (a/k/a Achisson Amenshi) and Larry Joe Brooks, who are members of the Delaware Tribe of Indians, operated a "smoke shop" on part of a restricted allotment that they leased from a member of the Creek Nation. Pet. App. 4a, 20a. Respondents were charged in the District Court of Tulsa County, Oklahoma, with the misdemeanor offenses of wilfully failing to produce records of their cigarette sales and wilfully preventing inspection of their premises by representatives of the Oklahoma Tax Commission, in violation of Okla. Stat. Ann. tit. 68, § 315 (West 1966) (Pet. App. 1a-3a).

On respondents' motion, the district court dismissed the informations for lack of jurisdiction (Pet. App. 123a-125a). The court concluded that the restricted allotment on which the smoke shop was located is "Indian country" within the meaning of 18 U.S.C. 1151(c) and that the State of Oklahoma therefore does not have jurisdiction over a crime committed by an Indian on the allotment (Pet. App. 124a). In the court's view, respondents must be treated as Indians for these purposes even though they are members of the Delaware Tribe and the crime allegedly was committed on a restricted Creek allotment (*ibid.*).

2. The State of Oklahoma appealed the dismissal of the prosecutions to the Court of Criminal Appeals of Oklahoma, the highest court of review for criminal cases. That court consolidated the case with *State* v. *Klindt,* S-84-781, which involves an assault with a dangerous weapon and interference with officials of the Oklahoma Tax Commission at a smoke shop on a trust allotment that the Delaware Tribe leased from a member of the Cherokee Nation. Pet. App. 20a-21a, 76a-79a. In a decision rendered on November 7, 1986, the Court of Criminal Appeals affirmed the dismissal of the informations in the in-

stant case, but remanded *Klindt* for a determination whether the defendant is an Indian (Pet. App. 19a-32a). Overruling the 50-year old precedent of *Ex parte Nowabbi* (Pet. App. 26a-29a), the court held that trust or restricted allotted lands of the Five Tribes are "Indian country" for purposes of the federal jurisdictional statutes, 18 U.S.C. 1151-1153, and that the State does not have jurisdiction over crimes committed by Indians on those lands (Pet. App. 21a-23a). However, the court made no mention of the Indian Department Appropriations Act of 1897, the Act of April 28, 1904, or the Oklahoma Enabling Act, discussed above (see pages 4-7, *supra*), which made the laws of Oklahoma applicable to members of the Five Tribes irrespective of the status of their lands.[6]

3. On the State's petition, the Court of Criminal Appeals granted rehearing in this case and *Klindt,* withdrew its prior opinion in those cases, and separated the two cases for further consideration (Pet. App. 33a-35a). Thereafter, on October 14, 1988, the Court of Criminal Appeals issued its opinion on rehearing in the instant case (Pet. App. 1a-18a).

This time, the court deemed it unnecessary to decide whether the allotments of members of the Five Civilized Tribes are "Indian country" within the meaning of 18 U.S.C. 1151(c) (Pet. App. 6a-7a, 12a). The court acknowledged that even if the allotment at issue here is "Indian country" and respondents are regarded as Indians for jurisdictional purposes, they would not be wholly immune from the State's cigarette tax laws. The court reasoned that

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[6] In *State ex rel. May* v. *Seneca-Cayuga Tribe,* 711 P.2d 77, 81 (Okla. 1985), the Supreme Court of Oklahoma criticized *Nowabbi* but did not overrule it. The Supreme Court emphasized the unique status of the Five Civilized Tribes and distinguished the Quapaw and Seneca-Cayuga Tribes (*id.* at 80-81). See also Pet. App. 16a n.1 (Bussey, J., dissenting).

under *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976), and *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), the State may tax sales of cigarettes by Indians to "non- or off-reservation Indians" in Indian country and may impose record-keeping requirements on Indians regarding those sales (Pet. App. 10a-13a). But the court nevertheless held that the informations in this case must be dismissed, explaining (*id.* at 14a):

> Because the informations in this case did not relate specifically to [respondents'] cigarette sales to non-Indians or off-reservation Indians, and thus did not meet the United States Supreme Court prerequisite to the exercise of state tax authority over Indians on Indian land, we hold that the State of Oklahoma did not have the power to prosecute and the district court did not have jurisdiction to adjudicate this controversy.

The court, however, failed to address the more fundamental and potentially dispositive question presented in this case: whether the restricted allotment on which respondents operated the smoke shop is even the kind of Indian land to which the principles of *Moe* and *Colville* apply, since (i) the allotment is not an Indian *reservation,* as in *Moe* and *Colville,* and (ii) state law is broadly applicable to members of the Five Civilized Tribes in any event by virtue of the Indian Department Appropriations Act of 1897, the Act of April 28, 1904, and the Oklahoma Enabling Act.[7]

ARGUMENT

The decision of the Oklahoma Court of Criminal Appeals is contrary to the legal principles that have governed

[7] As of the date of this filing, the Oklahoma Court of Criminal Appeals has not rendered its decision on rehearing in *Klindt.*

jurisdiction over Indians in the former territory of the Five Civilized Tribes for many years. When Oklahoma was admitted to the Union, Congress conferred on the State broad jurisdiction over the members of the Five Tribes. That jurisdiction permits Oklahoma to impose its cigarette tax and related record-keeping requirements even on sales made by Indians to other Indians on restricted allotments and to bring prosecutions in state court against Indians who violate the State's cigarette tax statute or other laws. The Court of Criminal Appeals therefore was fundamentally mistaken in its underlying assumption that the allotment in this case is subject to the jurisdictional principles that were applied to on-reservation sales to Indians in *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976), and *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980).

Questions concerning the scope of the State's jurisdiction over trust and restricted allotments of members of the Five Tribes are of considerable importance both to the State of Oklahoma and to the United States. The decision below creates considerable uncertainty regarding the application of the State's criminal, regulatory and taxing laws on those allotments. Moreover, if the State does not have general jurisdiction over the conduct of Indians on those lands, the United States would be required to exercise criminal jurisdiction, despite all the problems inherent in law enforcement where there is a checkerboard pattern of land ownership. Review by this Court therefore is warranted.

1. a. The major premise of the decision below—that the State of Oklahoma has only limited jurisdiction over Indians on the trust or restricted allotments of members of the Five Civilized Tribes—is contrary to the entire history of those Tribes since before the turn of the century.

As explained above (see page 4, *supra*), the Indian Department Appropriations Act of 1897 vested the United

States courts in the Indian Territory with exclusive jurisdiction over all crimes committed by "any person" in the Indian Territory (§ 1, 30 Stat. 83). And because there was no territorial legislature to prescribe local laws to govern Indians in the Indian Territory, Congress itself supplied that local law by making the laws of the State of Arkansas that were then in force in the Indian Territory applicable to "all persons therein, irrespective of race" (§ 1, 30 Stat. 83). This sweeping provision plainly admitted of no exception for "persons" who were Indians. See also Act of April 28, 1904, ch. 1824, § 2, 33 Stat. 573; *Stewart* v. *Keyes,* 295 U.S. at 409; *Marlin* v. *Lewallen,* 276 U.S. at 62.

Against this background, it was to be expected that when Oklahoma was admitted to the Union, Congress would continue to treat members of the Five Civilized Tribes essentially the same as non-Indians insofar as the jurisdiction of the new State was concerned. Accordingly, although jurisdiction over federal cases pending in the district courts of the Oklahoma Territory and the United States courts in the Indian Territory was transferred to the newly-created United States District Courts for the Western District and Eastern District of Oklahoma, respectively, cases of a local nature—including those arising under the laws of Arkansas in the former Indian Territory—were transferred to the courts of the State of Oklahoma. §§ 16-20, 34 Stat. 276-277. This necessarily included cases involving Indians on Indian lands, to which the laws of Arkansas had been extended in 1897 and 1904.[8] Moreover, in order to supply a uniform body of local law throughout

[8] The state courts of Oklahoma are made the "successor[s]" to the United States courts in the Indian Territory (§§ 18 and 19, 34 Stat. 277), and there is no suggestion that the occurrence of a crime on restricted land was to affect that status.

the State immediately upon statehood, Congress specified that the laws in force in the Oklahoma Territory at the time of statehood were to be extended over the entire State (including the former Indian Territory and the persons and property of the members of the Five Civilized Tribes within that Territory), until modified by the legislature of the newly admitted State. §§ 2, 13 and 21, 34 Stat. 268, 275, 277-278. The effect was to substitute Oklahoma law for Arkansas law, and thereby to bring the members of the Five Civilized Tribes directly under the judicial jurisdiction and substantive laws of the State of Oklahoma, except where Congress expressly provided otherwise. *Stewart* v. *Keyes,* 295 U.S. at 415; *Jefferson* v. *Fink,* 247 U.S. at 292-295; *Shultis* v. *McDougal,* 225 U.S. 561, 571-572 (1912).

b. As a result of the statutory provisions just discussed, Oklahoma Indians in the former territory of the Five Civilized Tribes have long been subject to the broad application of state laws. See also note 4, *supra.* By the same token, the scattered trust and restricted allotments of members of the Five Civilized Tribes have not constituted the sort of areas in which Indian Tribes typically govern their own members free from state interference.[9]

Consistent with this view, the Court of Criminal Appeals expressly held in *Nowabbi* in 1936 that the State of Oklahoma has criminal jurisdiction over a crime committed by one Indian against another Indian on a restricted allotment in the former territory of the Five

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[9] Our discussion of restricted land owned by individual Indians does not necessarily apply to tribal land, which may present different considerations. See *Indian Country, U.S.A., Inc.* v. *Oklahoma Tax Commission,* 829 F.2d 967 (10th Cir. 1987), cert. denied, No. 87-1068 (June 27, 1988) (barring state regulation of bingo games operated by the Creek Tribe on tribal land that had never been allotted or otherwise disposed of).

Tribes.[10] The Secretary of the Interior took the same position in 1942, after thoroughly studying the matter, and the Secretary affirmed that position in 1963. See page 8, *supra*. This longstanding and widely shared view of the United States and the State of Oklahoma that the State has jurisdiction over the trust and restricted lands of individual members of the Five Civilized Tribes is entitled to great weight. Compare *Solem* v. *Bartlett*, 465 U.S. 463, 478-479 (1984); *Oliphant*, 435 U.S. at 206.

This Court, too, has recognized the broad jurisdiction of the State of Oklahoma over members of the Five Civilized Tribes. In *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943), the Court sustained the application of state estate taxes to restricted property of members of the Five Tribes. The Court stressed that the principles that had supported the implication of tax exemptions for other Indians "do not fit the situation of the Oklahoma Indians" (319 U.S. at 603), and it continued (*id.* at 603-604, 608-609 (emphasis added)):

> Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in *Worcester* v. *Georgia*, *supra*; and, unlike the Indians involved in *The Kansas Indians* case, *supra*, they are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions.
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> Oklahoma supplies for them and their children schools, roads, *courts, police protection* and all other benefits of an ordered society.

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[10] It seems clear that the State exercised such jurisdiction prior to *Nowabbi*. See *McGlassen* v. *State*, 130 Pac. 1174 (Okla. Crim. App. 1913) (considering charges against an Indian for "malicious mischief" on an allotment within the former territory of the Choctaws and Chickasaws, without suggesting any lack of state jurisdiction).

Similarly, in *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 171 (1973), the Court distinguished its decision upholding the state taxes in *Oklahoma Tax Commission* on the ground that it presented a situation "where Indians have left the reservation and become assimilated into the general community." See also S. Rep. No. 1232, 74th Cong., 1st Sess. 6 (1935), quoted at Pet. 39-40.[11]

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[11] It might be argued that the State lacks general civil and criminal jurisdiction over restricted land in the former territory of the Five Civilized Tribes by virtue of 18 U.S.C. 1151. Section 1151 defines Indian country as including Indian reservations under the jurisdiction of the United States, dependent Indian communities, and allotments. Although this definition describes the scope of criminal jurisdiction, it also is frequently applied in a civil context. See *DeCoteau* v. *District County Court,* 420 U.S. 425, 427, n.2 (1975).

Section 1151 was added to Title 18 of the United States Code in 1948, as part of the recodification of the federal criminal laws. Act of June 25, 1948, ch. 645, 62 Stat. 757. The 1948 revision was intended to codify the original intent of Congress. Allotments were included as Indian country based on *United States* v. *Pelican,* 232 U.S. 442 (1914). See S. Rep. No. 1620, 80th Cong. 2d Sess. 1 (1948); H.R. Rep. No. 304, 80th Cong. 1st Sess. A92 (1947) (reviser's notes). *Pelican* held that an allotment was "Indian country" because the land was "under the jurisdiction and control of Congress for all governmental purposes, relating to the guardianship and protection of the Indians" (232 U.S. at 447). Restricted fee Osage allotments were found to satisfy this test because they were subject to federal control. See *United States* v. *Ramsey,* 271 U.S. 467, 471 (1926).

By contrast, restricted allotments of members of the Five Tribes do not fit the description in *Pelican.* Congress gave the state courts jurisdiction over heirship proceedings involving Five Tribes allotments and subjected them to state partition laws (Act of June 14, 1918, ch. 101, 40 Stat. 606); provided that state statutes of limitation would apply to restricted members of the Five Tribes (Act of Apr. 12, 1926, ch. 115, § 2, 44 Stat. 240); and required that any alienation of such land be approved by the state courts rather than the federal government (Act of Aug. 4, 1947, ch. 458, 61 Stat. 731). See note 4, *supra.* In any event, there is no indication that when Congress revised the federal criminal code in 1948, it intended implicitly to repeal the various statutes enacted at the turn of the century that conferred on the State broad jurisdiction over members of the Five Civilized Tribes (see App., *infra,* 7a).

2. The Oklahoma Court of Criminal Appeals also erred in extending the immunity from state taxes for on-reservation transactions involving Indians, which was recognized in *Moe* and *Colville,* to transactions occurring on an allotment situated outside any reservation. In both *Moe* and *Colville,* the Court recognized an immunity from state taxation for sales of cigarettes to Indians only because those sales occurred within a recognized reservation. See *Moe,* 425 U.S. at 475-481; *Colville,* 447 U.S. at 138, 144, 150-151 & n.26, 152, 160-161; see also *California* v. *Cabazon Band of Mission Indians,* 480 U.S. 202, 207-208, 214-216 & n.17 (1987); *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 179-181 (1973). No similar immunity to the general taxing jurisdiction of the State attaches outside a reservation (*Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973)), except, perhaps, where the state tax would be imposed directly on trust property (*id.* at 158-159). This aspect of the decision below may have broad implications in Oklahoma, as well as other States in which there are many allotments outside the boundaries of an established reservation.[12]

The Court of Criminal Appeals' recognition of an immunity from the state cigarette tax laws for off-reservation sales by Indians to Indians is especially unwarranted in this case, because the Indian vendor is not even a member of the Tribe to which the owner of the allotment belongs. Because respondents are not members of the Creek Nation, and because the Creek Nation's sovereignty therefore is not implicated, there would appear to be no arguable impediment to the application of the State's tax and record-keeping requirements in the circumstances of this

[12] Moreover, contrary to the court below (Pet. App. 14a), this Court has held that, even on a reservation, a State may require Indian vendors of cigarettes to keep records of their sales to both Indians and non-Indians. See *Colville,* 447 U.S. at 159-160.

case. Cf. *Colville,* 447 U.S. at 160; *Rice* v. *Rehner,* 463 U.S. 713, 718-721 (1983).

3. The issues raised by the decision of the Court of Criminal Appeals are of considerable practical importance. The Department of the Interior informs us that as of 1985, there were approximately 413,000 acres of trust or restricted individual Indian lands—comprising an estimated 20,000 separate tracts—within the original territory of the Five Civilized Tribes in eastern Oklahoma. If the State lacks general criminal jurisdiction over Indian activities on those widely scattered tracts, then the United States would be required to exercise jurisdiction over crimes committed by or against Indians on those lands. Law enforcement would be rendered very difficult, because as this Court stated in *Seymour* v. *Superintendent,* 368 U.S. 351, 358 (1962):

> [W]here * * * the existence or nonexistence of federal jurisdiction depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tracts books in order to determine whether criminal jurisdiction over each particular offense * * * is in the State or Federal Government.

Moreover, in the case of a restricted allotment, the status of the land could not even be ascertained by an examination of tract books, because legal title is in the Indian owner and the continuation of restrictions against alienation would turn on the quantum of Indian blood of the owner and other factors. See notes 4 & 11, *supra.* The situation could be complicated still further in many cases if only a fractional interest in the allotment were subject to restraints against alienation by virtue of the fact that only one of a number of joint owners possesses the requisite quantum of Indian blood.[13]

[13] The need for clarification is exemplified by *United States* v. *Sands,* No. 88-21-Cr. (E.D. Okla. Sept. 13, 1988). There, a Muscogee

The implications of the decision below are broader still because of the Court of Criminal Appeals' invocation of the principles of immunity applied in *Moe, Colville, Cabazon* and related cases in the context of state jurisdiction within the boundaries of an Indian reservation. The decision below therefore threatens to convert the trust and restricted allotments of individual members of the Five Civilized Tribes into thousands of "mini-reservations" scattered throughout eastern Oklahoma, on which Indians of any Tribe might enjoy an immunity from an as-yet-undetermined range of state laws. The result would be to create grave uncertainty regarding the application not only of the criminal and civil laws of Oklahoma that govern judicial disputes, but also the State's taxing, regulatory and other laws. The Court should grant review in this case to prevent this uncertainty and to affirm the jurisdiction of the State that has been recognized by the state and federal governments since Oklahoma was admitted to the Union.[14]

(Creek) Indian was convicted of the murder of another Muscogee Indian on a restricted allotment. The United States brought that prosecution only after the state court had dismissed charges against the defendant for lack of jurisdiction. *State* v. *Sands,* CRS 87-149 (Dist. Ct. Okfuskee County, Okla., Feb. 23, 1988).

[14] In its first opinion in the instant case, the Court of Criminal Appeals overruled its prior decision in *Nowabbi.* That first opinion was withdrawn, however, and the Court of Criminal Appeals' second opinion in the instant case, at issue here, does not mention *Nowabbi* and therefore presumably does not overrule it. It is possible that the Court of Criminal Appeals will address the continued force of *Nowabbi* when it renders its decision on rehearing in *Klindt.* However, for several reasons, we do not believe that the Court should deny certiorari here and await the decision in *Klindt.* First, it is possible that the Court of Criminal Appeals will again avoid a resolution of the jurisdictional issue in *Klindt* because the record does not affirmatively establish that the defendant is an Indian. Second, if this Court in the

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
DONALD A. CARR
Acting Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
EDWIN S. KNEEDLER
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FEBRUARY 1989

---

instant case sustains the application of the State's tax and related record-keeping statutes to sales by Indians to Indians on trust or restricted allotments on the ground that the Indian Department Appropriations Act of 1897, the Act of April 28, 1904, and the Oklahoma Enabling Act vest the State with plenary jurisdiction over conduct on such lands, it will follow *a fortiori* that the State's general criminal laws are applicable to offenses committed by Indians on such lands and that the result in *Nowabbi* continues to be sound.

APPENDIX A

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON

Office of the Solicitor

Aug. 17, 1942

The Honorable

The Attorney General.

Sir:

In a letter of April 28, 1941, from the Assistant Attorney General (your file WB:CAP:vng 90-2-017-60) the views of this Department were requested respecting the jurisdiction of the State and Federal courts in Oklahoma in cases involving crimes committed by and against Indians on the restricted Indian allotments in the area which was the Indian Territory and those in the area which was the Oklahoma Territory.

A mass of statutory provisions showing the changing and developing jurisdiction of courts in these areas has been found and most of the relevant provisions have been summarized or quoted in the attached memorandum. Because of the complexities of the matter this Department cannot speak with certainty with respect to the present jurisdiction but is presenting the following analysis and conclusions for your consideration.

Prior to the creation of the Oklahoma Territory and the Indian Territory by the act of May 2, 1890 (26 Stat. 81),

the whole area was known as the Indian Territory. During this period the Government recognized the exclusive jurisdiction of the Indian tribes over their own members and even over nonmembers within their territories. There were a few statutes defining crimes within this Territory and providing for a United States court for the prosecution of these crimes. However, as indicated in the reference to these statutes in paragraphs 1, 2, and 3 of the attached memorandum, these statutory provisions excluded from their application crimes committed by Indians. The act of March 3, 1885 (23 Stat. 385, 18 U. S. C. sec. 548), probably did not apply to the old Indian Territory, since there were no Territorial organization, laws and courts to function under the statute (*In re Jackson,* 40 Fed. 372, C. C. Kans., 1889).

Upon organization under the act of May 2, 1890, the United States district courts in the Oklahoma Territory and the Indian Territory were given jurisdiction by sections 12 and 36, respectively, of crimes by Indians against Indians of other tribes to the same extent as if such crimes were committed by citizens. This grant of jurisdiction increased the jurisdiction which I believe these courts automatically obtained under section 548 of title 18 of the named crimes committed by Indians against Indians or others. These district courts had a dual role. As United States courts they enforced the Federal laws and as Territorial courts they enforced the Territorial laws, being at the outset the laws of Nebraska in the Oklahoma Territory and the laws of Arkansas in the Indian Territory. As United States courts enforcing Federal law they had jurisdiction over crimes committed by white persons against either Indians or other persons under section 217 of title 25 of the United States Code (*Brown* v. *United States,* 146 Fed. 975 (C. C. A. 8th, 1906)). As Territorial courts they could enforce section 548 of title 18 by the trial of the In-

dians committing the crimes named therein in the same manner as such crimes were tried when committed by other persons. As Territorial courts they could also try Indians for crimes committed against Indians not members of the tribe in the same manner as in the case of other persons.

The act of June 7, 1897 (30 Stat. 83), and subsequent statutes relating to the Indian Territory completely altered the situation in that Territory with respect to jurisdiction over Indian crimes. The 1897 act placed in the district courts jurisdiction over all crimes committed by any person in the Indian Territory, and the laws of Arkansas in force in the Territory were made to apply to all persons, regardless of race. Subsequent acts abolished the Indian courts and tribal jurisdiction and organization. These acts, therefore, removed the essential characteristic of the Indian country, which was the application of tribal laws within the area. Since the Territorial laws were made to apply to all persons in the Indian Territory, both section 548 of title 18 and section 217 of title 25 were apparently superseded. This conclusion is fortified by the act of March 3, 1901 (31 Stat. 1447), which gave citizenship to every Indian in the Indian Territory and by the last proviso in the act of May 8, 1906 (34 Stat. 182), which provided that the Indians in the Indian Territory should not be covered by the provision subjecting all Indian allottees to the exclusive jurisdiction of the United States until the issuance of fee simple patents. No similar changes in jurisdiction were made in the Oklahoma Territory.

Upon the organization of the State of Oklahoma pursuant to the Enabling Act of June 16, 1906 (34 Stat. 267), the State courts succeeded to the jurisdiction of the Territorial courts, except as to the crimes defined by Federal law which were placed within the jurisdiction of the Federal courts. The State courts, therefore, apparently ac-

quired jurisdiction of all Indian crimes in that part of the State which had been the Indian Territory. In that part of the State which had been Oklahoma Territory it is my opinion that the second part of section 548 of title 18 had immediate application, placing in the Federal courts jurisdiction of the named crimes committed by Indians in Indian reservations in the States. This part of section 548 did not apply to the Indian Territory part of the State, since the Indian reservations therein had lost their character as Indian country.

The conclusions of this Department thus follow substantially the decision of the Supreme Court in the case of *United States* v. *Ramsey,* 271 U. S. 467, and the opinion of the Oklahoma Supreme Court in *Ex parte Nowabbi,* 61 P. (2d) 1139. The *Ramsey* case held that a restricted allotment on the Osage Reservation, which had been a part of the Oklahoma Territory, was Indian country within the meaning of section 217 of title 25, and that therefore the Federal court had jurisdiction of a crime committed by a white person against an Indian. Of course, any jurisdiction under section 217 of crimes exclusively involving white persons on the Indian reservations was lost by the acquisition of statehood, as in the case of other States. The *Nowabbi* case held that the State courts had jurisdiction over a crime by one Indian against another committed on a restricted allotment in the area formerly the Indian Territory.

The conclusions of the Department may be summarized as follows:

(1) In that part of Oklahoma which was the Indian Territory a restricted Indian allotment is no longer Indian country and section 217 of title 25 does not apply to give the Federal courts jurisdiction of crimes against Indians and section 548 of title 18 does not apply to give the Federal courts jurisdiction of the named crimes by In-

dians. Jurisdiction of all crimes by and against Indians is in the State courts.

(2) In that part of the State which was Oklahoma Territory a restricted Indian allotment continues to have the character of Indian country in the same manner as restricted allotments and reservations elsewhere in the country, with the possible exception of crimes committed by Indians against nonmember Indians, which crimes are apparently within the jurisdiction of the State courts as a result of the 1890 statute. On these allotments both section 217 of title 25 and section 548 of title 18 apply. Crimes between Indians of the same tribe which are not covered by section 548 remain subject to tribal jurisdiction.

The presentation of these legal conclusions should be accompanied by some statement of the practical situation. None of the tribes in Oklahoma has exercised criminal jurisdiction in recent years and none has a court of Indian offenses established either by the tribe or under the regulations of this Department. It is therefore important that some definite criminal procedure be established for crimes not embraced by Federal or State law. In view of the complexities of jurisdiction in Oklahoma and in view of this practical problem this Department would be glad to receive your suggestions as to the substance of a bill which might be presented to Congress on the subject.

Very truly yours,

(Sgd.) OSCAR L. CHAPMAN
Assistant Secretary.

Enclosure 690427.

CTL:mvp

APPENDIX B

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D.C.

Mar. 27, 1963

Dear Mr. Attorney General:

On November 29, 1962, you wrote me seeking an opinion as to whether it would be a constructive measure for the Department of Justice to appear *amicus curiae* or on behalf of Indians in court cases where States, under questionable authority, have asserted criminal jurisdiction over offenses committed by Indians in Indian country.

Mr. Barry, the Solicitor of the Department of the Interior, has spoken informally with Assistant Attorney General Clark in the interval since your letter was received, pointing out that our reply would be delayed because of the complicated nature of the problem and the need for giving it additional study.

As you are no doubt aware, several States had asserted civil and criminal jurisdiction in Indian country prior to the passage of Public Law 280, 83d Congress, despite the fact that no Federal statutes of relinquishment and transfer had been enacted. Foremost among these were Michigan, Oklahoma, North Carolina, and Florida. Jurisdiction was also been asserted by certain counties in such States as Washington, Nevada, and Idaho. Following the enactment of Public Law 280, Nevada, Washington, and Florida passed legislation either bringing Indian country under their jurisdiction, or permitting tribes to petition for such jurisdiction, or providing local option for the

assumption of jurisdiction by individual counties. The other States mentioned above did not take such action, although they have continued to assert jurisdiction. Officials of both Oklahoma and North Carolina have contended in letters to this Department that they have criminal jurisdiction over the Indians of their States irrespective of the fact that they do not have such jurisdiction under a specific Federal statute, and the States themselves have not taken positive action under the provisions of Public Law 280.

On August 17, 1942, the views of this Department concerning the jurisdiction of the State of Oklahoma over offenses committed by and against Indians on restricted Indian allotments in the State was furnished your Department. Your reference on the matter was WB:CAP 90-2-017-60. The adoption in 1948 of the current statutory definition of Indian country in 18 U.S.C. § 1151 does not appear to require revision of the jurisdictional conclusions stated in our 1942 letter and summary. These conclusions were that restricted Indian allotments in the part of Oklahoma which was formerly Indian Territory were no longer Indian country, but that such allotments in the part of the State which was formerly Oklahoma Territory continued to have the character of Indian country in the same manner as restricted allotments elsewhere in the country, with the possible exception of crimes committed by Indians against non-member Indians. In the latter instance, it was pointed out that such crimes apparently were within the jurisdiction of the State courts as a result of the Act of May 2, 1890 (26 Stat. 81).

It is generally true that in the areas where States are exercising criminal jurisdiction under doubtful authority, the Indian tribes are not in a financial position to assume any law and order responsibility for themselves. Furthermore,

the Bureau of Indian Affairs at this time does not have sufficient staff nor funds to take over law enforcement for them. If, however, the jurisdiction of the States within Indian country were to be successfully challenged by the Federal Government, it would then appear incumbent on our Department to provide the Indians approriate substitute systems of law and order. In this connection, we would need to explore present capabilities for establishing reservation courts, and you would undoubtedly wish to consider the impact that the prosecution of petty offenses under 16 U.S.C. § 1132 would have upon your United States Attorneys and the Federal Courts. Consideration will also have to be given to the fact that many of those Indians have long since abandoned tribal self-government and have become accustomed to looking to the State for the maintenance of law and order in their communities.

I therefore feel it vital to the overriding interest of the Indians in the maintenance of law and order that members of our two Departments confer on what presently can be done by our Departments to see that where States are determined not to have criminal jurisdiction over Indians in Indian country, a breakdown of law enforcement will not occur. I am suggesting that Solicitor Barry designate someone to represent his office in such discussions, and shall also ask Commissioner of Indian Affairs Phillco Rash to select a representative for this Bureau. These persons will, I am sure, be available to explore this matter further at a time agreeable with you and whichever officials

for the Department of Justice you may designate as your representatives.

Sincerely yours,

(Sgd.) STEWART L. UDALL
Secretary of the Interior

Hon. Robert F. Kennedy
Attorney General
Department of Justice
Washington 25, D.C.

Followup PRS 0755

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No. 88-1147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF OKLAHOMA,
Petitioner,

v.

CHESTER LEE BROOKS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals for the State of Oklahoma

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF MUSCOGEE (CREEK) NATION AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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---

MOTION FOR LEAVE TO FILE BRIEF OF MUSCOGEE (CREEK) NATION AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 36.1, the Muscogee (Creek) Nation moves the Court for leave to file the attached brief *amicus curiae* on the side of respondents in opposition to the petition for a writ of certiorari in this case. *Amicus* requested the parties to consent to the filing of this brief. Respondents have consented, but the petitioner has refused consent. By order of the Court, respondents were granted time until March 30, 1989, to file their opposition.

Amicus is a federally-recognized Indian tribe with a longstanding treaty relationship with the United States and an established, well-organized tribal government.

E.g., Board of County Comm'rs v. Seber, 318 U.S. 705 (1943). Petitioner and the United States challenge the decision below by contending that the Nation has no reservation, and that the Nation and its members are subject to virtually total state authority and control on all Indian-owned lands restricted against alienation by federal law. A holding by this Court in favor of petitioner on these grounds would have a devastating impact on the Nation and its members, for it would deprive the Nation of virtually all its governmental authority.

The Nation's governmental interest is vital to it, and differs from that of any party. *Amicus* submits the attached brief in order to show that the jurisdictional status of restricted Creek allotments has no direct bearing on the judgment below, and to call the Court's attention to the full history of decisions by this Court and the lower federal and state courts precluding state jurisdiction and upholding federal and tribal jurisdiction over Oklahoma Indian lands, including restricted Five Tribes allotments. Because of this history and the consistency of lower federal and state court decisions upholding federal jurisdiction and denying state authority, there is no occasion for this Court's review of this case.

For these reasons, *amicus* requests that its motion for leave to file the attached brief *amicus curiae* be granted.

Respectfully submitted,

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Counsel for Muscogee (Creek) Nation

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STATE OF OKLAHOMA,

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On Petition for a Writ of Certiorari to the Court of Criminal Appeals for the State of Oklahoma

---

BRIEF OF MUSCOGEE (CREEK) NATION AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS

Amicus is an important federally-recognized Indian tribe with a continuous treaty relationship with the United States, starting in the earliest years of the Republic, and with an established, well-organized tribal government. *E.g., Board of County Comm'rs v. Seber*, 318 U.S. 705 (1943). Its governmental authority would be devastated if the Court were to rule favorably on the contentions presented by petitioner. Petitioner argues that the Nation has no reservation and virtually no governmental authority over restricted lands owned by its members. The Nation has a vital interest in protecting its governmental authority, and its corresponding exemption

from state jurisdiction. This authority and exemption are established in prior decisions of this Court and all modern decisions on this and related subjects by lower federal and state courts.

STATEMENT

Amicus does not agree with the "Nature of the Controversy" as set out at pp. 4-7 of the Petition,[1] or that any of the three questions presented by petitioner are raised by the decision below.

Amicus also differs in many respects with the Statement presented by the United States, particularly with its "jurisdictional history of the Indian Territory" (Br., pp. 2-8). *Amicus* specifically denies the contention that "the long-held understanding has been that actions by Indians on Indian allotments within the former territory of the Five Civilized Tribes are subject to the civil and criminal jurisdiction of the State to the same extent as if they involved non-Indians and occurred on non-Indian land" (United States Br., p. 2). While *amicus* responds to some of the contentions in the United States' Statement in the body of this brief, *amicus* suggests that the best and most objective summaries of the jurisdictional history of the Creek Nation, its governmental authority and its lands are found in: (1) *Harjo v. Kleppe*, 420 F.Supp. 1110, 1118-1142 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978); (2) *Indian Country USA v. Oklahoma Tax Comm.*, 829 F.2d 967, 970-972, 974-981 (10th Cir. 1987), *cert. denied sub nom., Oklahoma Tax Comm. v. Muscogee (Creek)*

[1] This is not, for example, "one of three parallel cases" involving jurisdiction over restricted Five Tribes allotments (Pet., pp. 4-5). This Court has denied a petition for writ of certiorari already in *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), *cert. denied*, —— U.S. ——, 109 Sup. Ct. 795 (1989). This case and *Hodel* do not present the jurisdictional issues of concern to petitioner.

Nation, —— U.S. ——, 108 Sup. Ct. 2870 (1988); and (3) *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1440-1442 (D.C. Cir. 1988), *cert. denied*, —— U.S. ——, 109 Sup. Ct. 795 (1989).

Amicus defers to respondents with respect to discussion of the proceedings below.

SUMMARY OF ARGUMENT

I. In dismissing the criminal informations the courts below applied the rules established by this Court with regard to state taxation of sales by Indian smokeshop operators. *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985); *Washington v. Confederated Colville Tribes*, 447 U.S. 134 (1980); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). Those rules are the same, irrespective of whether a state does or does not have general criminal and civil jurisdiction over Indian lands: the state may tax sales to non-Indians and not tax sales to Indians. This case does not, accordingly, present the question of principal concern to petitioner and the United States—the State's criminal and civil authority over Indians on restricted Five Tribes allotments.

2. Petitioner and the United States contend that even sales to Indians on restricted Five Tribes allotments may be taxed by the State, because—unlike any other trust or restricted lands—these allotments have absolutely no immunity from state jurisdiction and the tribes have essentially no jurisdiction over them. This Court should not consider this question in this case because—

a. the federal statute defining "Indian country," 18 U.S.C. Sec. 1151, plainly includes restricted Five Tribes allotments; e.g., *United States v. Ramsey*, 271 U.S. 467 (1926);

b. decisions of this court shortly after statehood held that federal authority and Indian country jurisdiction remains on restricted Five Tribes allotments, *e.g.*, *United*

States v. Wright, 229 U.S. 226 (1913), and all recent decisions by both federal and state courts have consistently sustained Indian country status of trust and restricted lands in Oklahoma;

c. the reservation and jurisdictional status of restricted Creek allotments should not be reviewed at this interlocutory stage in this case on a record devoid of detailed evidentiary materials as to the jurisdictional history of Creek lands; and

d. the practical difficulties of checkerboard jurisdiction in eastern Oklahoma jurisdiction are far more manageable than would be the devastating impact on the Five Tribes' governmental authority of a decision subjecting the Tribes and their members to complete state regulatory control and taxing authority.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW, MODIFIED AFTER REHEARING, DOES NOT SQUARELY PRESENT THE QUESTION OF WHETHER OKLAHOMA HAS GENERAL CRIMINAL AND CIVIL JURISDICTION OVER RESTRICTED ALLOTMENTS OF THE FIVE TRIBES.

The Oklahoma Court of Criminal Appeals (modified decision) held that the criminal informations in this case must be dismissed because they "did not relate specifically to . . . cigarette sales to non-Indians or off-reservation Indians," but pertained to all sales, including sales by Indians to Indians. (Pet. App. p. 14a). Petitioner and the United States do not contend that the sufficiency of the information merits review by this court, and plainly it does not.

The modified decision of the Court of Criminal Appeals also leaves open the primary issue raised by petitioner: whether Oklahoma has general criminal and civil jurisdiction over restricted allotments of the Creek Nation and Five Tribes. However that question is answered, under

controlling decisions of this Court the State can tax cigarette sales to non-Indians by Indian sellers, but not sales to Indians, and can impose reasonable record-keeping requirements on operators of Indian smokeshops. E.g., *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985); *Washington v. Confederated Colville Tribes*, 447 U.S. 134 (1980); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

Chemehuevi and *Colville* arose on Indian lands that *are* subject to general state criminal and civil jurisdiction under "Public Law 280." [2] The presence of state criminal and civil jurisdiction in these cases was not, however, relevant to this Court's determination that the states involved could tax sales of cigarettes to non-Indians.[3] By contrast, *Moe*, *supra*, arose on a Reservation where the state has criminal but not civil jurisdiction.[4] This Court

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[2] Act of August 15, 1953, ch. 505, 67 Stat. 588, codified as amended at 18 U.S.C. Sec. 1162, 25 U.S.C. Secs. 1321-1326, 28 U.S.C. Sec. 1360, 1360 note. *See, e.g., Colville*, 447 U.S., *supra*, at 142, n. 8. Public Law 280 has ben interpreted by several recent decisions of this Court. E.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Washington v. Confederated Bands of the Yakima Indian Nation*, 439 U.S. 463 (1979); *Bryan v. Itasca County*, 426 U.S. 373 (1976).

[3] That conclusion followed instead from this Court's determinations that the incidence of the challenged state tax fell on the non-Indian buyer, 447 U.S. at 151, that federal law did not preempt the state tax and that the tax did not interfere with the principle of tribal self-government. 447 U.S. at 154-157. The Court also determined that "the State's interest in assuring the collection of sales taxes from non-Indians enjoying the off-reservation services of the State was sufficient to warrant the minimal burden imposed on the tribal smokeshop operators" to keep records and remit taxes. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987).

[4] Mont. Code Ann. Sec. 2-1-301 (1987). The presence of state criminal jurisdiction (but not civil authority) played no part in the Court's analysis.

reached the same result in *Moe* as in *Chemehuevi* and *Colville*. Sales of cigarettes by Indian smokeshops to non-Indians are likewise taxable, and sales to Indians are not taxable, in states without any criminal or civil jurisdiction over Indian lands. *Stagner v. Wyoming State Tax Commission*, 682 P.2d 326 (Wyo.), *appeal dismissed*, 469 U.S. 876 (1984) (relying on *Moe* and *Colville*).

Petitioner is thus simply wrong that "the instant case squarely presents the question of the authority of the State of Oklahoma . . . over Indians on restricted Indian allotments, specifically including . . . allotments to members of the Five Civilized Tribes. . . ." (Pet. p. 6). The presence or absence of state criminal and civil jurisdiction in Oklahoma is irrelevant to the state's taxing authority over sales by Indian smokeshops. That taxing authority is the same in either situation, as the court below recognized in its modified decision on re-hearing. The decision below treats Indian "smokeshops" on restricted Creek allotments in the same manner as smokeshops on tribal or allotted lands in other states, and applies this Court's controlling cases—in fact vindicating Oklahoma's taxing authority over sales to non-Indians.[5] The decision below thus gives no occasion for review in this Court.

II. THIS COURT SHOULD NOT REVIEW THE "IMPLICIT HOLDING" OF THE COURT BELOW THAT RESTRICTED CREEK ALLOTMENTS ARE INDIAN COUNTRY UNDER FEDERAL LAW.

Petitioner's real complaint is that the court below "implicitly" held that the restricted Creek allotment on which the smokeshop is located is "Indian country" under 18 U.S.C. Sec. 1151. (Pet. p. 14). Petitioner and the United States actually contend for a unique and extreme rule to be applied only to the Five Tribes: that—unlike

[5] Under petitioner's view, sales by Indian smokeshops to Indians would also be taxable on Five Nations allotments. In Part II, we show that this is not an issue worthy of review by this Court.

on all other trust or restricted Indian lands—Indians on restricted Creek allotments have no immunity from state jurisdiction, that the reservation of the Creek Nation has been abolished, and its governmental authority has been effectively dissolved. Under this extreme position, restricted Creek allotments would be subject to essentially the same state regulatory control as land purchased today by a tribal member in, say, downtown Dallas or Kansas City,[6] and the Nation would have no effective governmental authority despite decades of federal policies and programs dedicted to revitalizing and developing their self-governing powers. Such a rule would obviously "implicate"—indeed, devastate—the Creek Nation's sovereignty (Compare United States Br.., p. 17).

The "implicit holding" of the court below does not merit this Court's review at this time in this case for several reasons. As we show below, it is simply not true that "the entire history of (the Five) Tribes since before the turn of the century" has rejected the Indian country status of restricted Five Tribes allotments and recognized complete state jurisdiction over them. (Compare U.S. Br., p. 12) The language of the Indian country definition in the revised 1948 U.S. Code clearly applies to Five Tribes allotments. Moreover, decisions of this Court shortly after statehood, as well as every modern decision of federal and state courts, treat restricted allotments as Indian country and under federal authority.

A. The "Implicit Holding" Of The Court Below That Restricted Creek Allotments Are Indian Country Is Compelled By The Language Of 18 U.S.C. Sec. 1151.

Section 1151,[7] as revised in 1948, provides:

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[6] The sole important difference would be that the restricted allotment could not be sold, even for nonpayment of taxes.

[7] Act of June 25, 1948, ch. 645, Sec. 1, 62 Stat. 757; as amended by Act of May 25, 1949, ch. 139, Sec. 25, 63 Stat. 94.

Sec. 1151. *Indian country defined*

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

There is no credible argument that restricted Five Tribes allotments are not "Indian country" under Section 1151 (c). Restricted Five Tribes allotments are plainly in the class of "all Indians allotments." "Indian titles have not been extinguished" to them.[8]

This Court even prior to the 1948 revision of the United States Code refused to make any distinction between trust and restricted allotments in Oklahoma with respect to federal Indian country jurisdiction. In *United States v. Ramsey*, 271 U.S. 467, 469 (1926), this Court explained that:

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[8] Moreover, restricted Five Tribes allotments also constitute "dependent Indian communities" under the Section 1151(b). See *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *United States v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986); *United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982); *United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir., 1971). Oklahoma cases have applied this standard as well to preclude state jurisdiction on Oklahoma Indian lands. *CMG v. State*, 594 P.2d 798 (Okla.), *cert. denied*, 442 U.S. 992 (1979) (Chilocco Indian School is a dependent Indian Community, and thus "Indian country;" there is accordingly no state juvenile court jurisdiction).

> [t]he authority of the United States . . . to punish crimes occurring within the state of Oklahoma, not committed by or against Indians, was ended by the grant of statehood . . . . (citations omitted) But authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before . . .

The Court went on to conclude:

> . . . that the difference between a trust allotment and a restricted allotment, so far as that difference may affect the status of the allotment as Indian country, was not regarded as important. . . . In practical effect, the control of Congress, until the expiration of the trust or the restricted period, is the same.

Id., at 470-471.

The Court further observed in *Ramsey*:

> . . . it would be quite unreasonable to attribute to Congress an intention to extend the protection of the criminal law to an Indian upon a trust allotment and withhold it from one upon a restricted allotment; and we find nothing . . . which would justify us in applying the term 'Indian country' to one and not to the other.

Id., at 471-472.[9]

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[9] Similarly, in *United States v. Hellard*, 322 U.S. 363, 366 (1944), this Court in a case involving descent of a restricted Creek allotment held that the United States is an indispensable party to any suit to partition the allotment, and observed:

> Restricted Indian land is property in which the United States has an interest. "This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust." *Heckman v. United States*, 224 U.S. 413, 437. Though the Indian's interest is alienated by judicial decree, the United States may sue to cancel the judgment and set the conveyance aside where it was not a party to the action. . . . The governmental interest throughout the partition proceedings is as clear as it would be if the fee were in the United States.

In the past Congress has granted state criminal or civil jurisdiction over "Indian country," as it did in Public Law 280, *supra*. Oklahoma is not a Public Law 280 state. Petitioner and the United States claim Oklahoma nonetheless has general criminal jurisdiction over restricted allotments belonging to members of the Five Tribes by virtue of congressional enactments just prior to Oklahoma statehood. But discussed in Section II B, *infra*, all recent decisions of *both* federal and state courts conclude that Congress has never granted this jurisdiction to Oklahoma.

B. The "Implicit Holding" Of The Court Below That Restricted Creek Allotments Are Indian Country Is Consistent With Prior Decisions Of This Court And All Current Decisions Of All Lower Federal And State Courts.

1. *Decisions of this Court.*

This Court has never held that Oklahoma has general and complete criminal jurisdiction over restricted Five Tribes allotments, or that restricted Five Tribes allotments are not "Indian country." Petitioner and the United States refer principally to *Marlin v. Lewallen*, 276 U.S. 58 (1928).[10] In *Marlin*, this Court observed that Congress prior to statehood extended the laws of Arkansas over many activities by members of the Five Tribes. However, *Marlin* held that Arkansas laws imposing curtesy were *inapplicable* to descent of Creek allotments because those state laws were preempted by two agreements between the Creek Nation and the United States, ratified by Congress.[11]

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[10] Petitioner and the United States also rely heavily on *Ex Parte Nowabbi*, 61 P.2d 1139 (Okla. Cr.1936). As we show in Section II B 2, however, *Nowabbi* has been withdrawn and disapproved, and is inconsistent with all modern federal and state decisions.

[11] Both before and after statehood, Congress has allocated jurisdiction over Five Tribes lands between the United States, the State

Marlin is thus entirely consistent with continued federal jurisdiction over restricted Five Tribes allotments, a jurisdiction in fact confirmed by decisions of this Court shortly after statehood. For example, in *Tiger v. Western Investment Co.*, 221 U.S. 286, 309 (1911), this Court sustained Congress' power to continue restrictions on the alienation of Creek allotments, observing specifically that "[i]n passing the enabling act for the admission of the state of Oklahoma. . . Congress was careful to preserve the authority of the government of the United States over the Indians, their lands and property, which it had prior to the passage of the act." And in *United States v. Wright*, 229 U.S. 226 (1913), this Court specifically held that restricted Five Tribes allotments remained "Indian country" for purposes of enforcing federal laws prohibiting the introduction of liquor. The Court rejected the argument that the 1906 enabling act had repealed this Indian country status, relying in part on the Eighth Circuit's contemporaneous holding in *United States Express Co. v. Friedman*, 191 Fed. 673 678-679 (8th Cir. 1911), which also specifically rejected the argument that Five Tribes restricted allotments "ceased to be Indian country upon admission of Oklahoma as a state." (See 229 U.S. *supra* at 238). See also *Ex Parte Webb*, 225 U.S. 663 (1912); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.), p. 779, n. 85. ("[a]t least some Indian country laws were applied to restricted Indian lands in Indian Territory" between 1897 and statehood).

As Petitioner (Pet., p. 17) and the United States (Br., p. 15) note, this Court sustained application of state estate taxes to some restricted Five Tribes property in

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and the Tribes. The United States so concedes, Br., p. 7, n. 4. If, of course, Congress had absolutely surrendered jurisdiction over Five Tribes lands to the State, the subsequent statutes granting state jurisdiction over particular and limited subject areas referred to by the United States would be unnecessary.

its closely divided decision in *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). That state taxing authority was, however, pursuant to a specific statutory grant, and no statute has abolished Indian country status of restricted Five Tribes allotments. The *Oklahoma Tax Commission* decision predates the 1948 codification of the Indian country definition in Section 1151(c). More broadly, the observations of the Court in 1943 are no longer completely accurate today. The policy of Congress since the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. Sec. 501 *et seq.*, has been to strengthen tribal self-government in Oklahoma. E.g., *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), *cert. denied*, —— U.S. ——, 109 Sup. Ct. 795 (1989). Implementation of this Act and of modern federal Indian policies of tribal self-determination and economic self-sufficiency, such as contained in the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. Secs. 450 *et seq.*, have revitalized the Nation and the other Five Tribe governments. Today, the Nation and other Five Tribes governments administer millions of dollars of federal programs and services annually, run schools and have active and functioning tribal courts.[12]

True, Congress *considered* the abolition of the Five Tribes reservations and governments in the period prior to statehood, but it decided not to carry through that policy. Instead, Congress has revitalized the self-governing powers and autonomy of the Five Tribes in the past several decades. Petitioner and the United States selectively present only the parts of the history that are consistent with their parsimonious and inaccurate viewpoint. That viewpoint, we show in the next section, is contrary to the analysis of *every* state and federal court to consider these questions in the past two decades.

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[12] E.g., *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), *cert. denied*, —— U.S. ——, 109 Sup. Ct. 795 (1989).

2. Decisions of Lower federal and state courts.

Petitioner and the United States rely heavily on a 1936 decision by the Oklahoma Court of Criminal Appeals, which did hold that the State had criminal jurisdiction over a murder committed by an Indian on a restricted Choctaw allotment. *Ex Parte Nowabbi*, 61 P.2d 1139 (Okla. Cr. 1936). There is no reason, however, to believe *Nowabbi* is good law today. That decision was severely criticized, disapproved and withdrawn by the Oklahoma Supreme Court in *State ex rel May v. Seneca-Cayuga Tribe*, 711 P.2d 77, 81, and n. 17 (Okla. 1985) and—as the Oklahoma Supreme Court noted in *Seneca-Cayuga, supra*—has also been strongly criticized by the major Indian treatise, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, pp. 777-780, esp. n. 84. (1982 ed.) The Oklahoma state court system declined three times to follow *Nowabbi* in this very case.

In recent years, every lower state and federal court to address trust and restricted Indian lands in Oklahoma has agreed that "Indian country" in Oklahoma includes: (1) restricted Osage allotments, *State v. Burnett*, 671 P.2d 1165 (Okla. Cr. 1983); *United States v. Burnett*, 777 F.2d 593 (10th Cir. 1985), *cert. denied*, 476 U.S. 1106 (1986); (2) Kiowa trust allotments, *State v. Littlechief*, 573 P.2d 263 (Okla. Cr. 1978) (agreeing with unpublished federal district court decision to the same effect, see 573 P.2d at 264), and (3) tribal trust lands, compare *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985) (Quapaw tribal lands) with *Indian Country USA v. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987) *cert. den. sub. nom., Oklahoma Tax Commission v. Muscogee (Creek) Nation*, —— U.S. ——, 108 S.Ct. 2870 (1988) (tribal lands of Creek Nation).

Indian Country USA, supra, is particularly instructive for present purposes. In denying state authority to regulate tribal bingo on tribal trust lands belonging to the

Creek Nation,[13] the Tenth Circuit carefully reviewed the turn of the century legislation relied on by petitioner and the United States (particularly the 1897 Indian Appropriation Act and 1906 Oklahoma Enabling Act) and concluded that:

> Although the federal legislation described above seriously undermined the authority of the Creek Nation, we are not persuaded that Congress intended or acted to completely abolish Creek Nation jurisdiction over tribal lands, to divest the federal government of its authority, or to permit the assertion of jurisdiction by the State of Oklahoma.
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> . . . The language of the Oklahoma [enabling] act, read in its historical context, suggests that Congress intended to preserve its jurisdiction and authority over Indians and their lands in the new State of Oklahoma until it accomplished the eventual goal of terminating the tribal governments, assimilating the Indians and dissolving completely the tribally-owned land base—events that never occurred and goals that Congress later expressly repudiated. The State has failed to cite any acts of Congress that clearly reveal an intent to divest the federal and tribal governments of jurisdiction over Creek tribal lands and to confer such authority on the State of Oklahoma.

829 F.2d at 978, 979-980. (footnote omitted)

All the recent decisions of lower state and federal courts concerning the Indian country status of Oklahoma Indian lands—including the decision below—are congruent, are consistent with this Court's analysis in *Tiger, Wright and Ramsey, supra* Section II B 1, and apply the usual rules of federal Indian country jurisdiction to

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[13] The Tenth Circuit did not specifically address the jurisdictional status of restricted Creek allotments. 829 F.2d *supra* at 970 and 980 n. 5. 18 U.S.C. Sec. 1151 makes no distinction between tribal lands and restricted allotments. See Section II A, *supra*.

Oklahoma Indian lands. This indicates that the "Indian country" status of restricted Five Tribes allotments will be resolved adequately and consistently by lower courts and will not require plenary review in this Court.

There are, it is true, a few authorities in addition to *Nowabbi, supra*, going against the modern trend on this issue. Like *Nowabbi*, these authorities predate the statutory Indian country definition in 18 U.S.C. Sec. 1151 and have not been followed in recent decisions. For example, a 1943 decision by the Tenth Circuit stated that Oklahoma has full criminal and civil jurisdiction over all Oklahoma Indians. *United States v. Hester*, 137 F.2d 145, 147. Petitioner calls that dicta to the Court's attention (Pet., pp. 18, 32-33), but does not advise the Court that this dicta has been disavowed by the Tenth Circuit in *Indian Country USA*, 829 F.2d *supra* at 980, n. 6.[14]

C. The Contentions Pressed By Petitioner And The United States Should Only Be Considered In A Case Squarely Presenting Them And Upon A Full Evidentiary Record Developed At The Trial Court Level.

The United States would deprive the Nation of its reservation and subject its members' lands to complete state jurisdiction. (Br., p. 17) This Court has recognized that the continued existence of an Indian reservation depends on the language of the relevant acts of Congress, their legislative history and all circumstances surrounding their passage, including the negotiations with the affected tribe or tribes. E.g., *Solem v. Bartlett*, 465 U.S. 463, 467-

[14] Similarly, in 1942 the Secretary of the Interior did express a somewhat equivocal view that Oklahoma had general criminal jurisdiction over Five Tribes restricted allotments. But the Secretary's letter admitted that he "cannot speak with certainty with respect to the present jurisdiction" (United States App. p. 1a) and recommended that "a bill . . . might be presented to Congress on the subject." (*Id.* at p. 5a).

472 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586-587 (1977). Similarly, the Court has observed that the extent to which a particular tribe's sovereignty has been altered, divested, diminished or supplanted with the state jurisdiction requires "a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856 (1985).

The Creek Nation disputes the contentions of the United States. *Amicus* does not believe this Court needs to rule upon these contentions, given the clarity of Section 1151 and the consistency of decisions in federal and state courts since its enactment in 1948. If the Court does wish to consider these questions, a far more extensive record is required than has been developed in this case [15] —which arises on a motion to dismiss informations, does not involve any of the Five Tribes or the United States as a party, and does not directly present the question of continued reservation existence or any detailed evidentiary materials concerning the jurisdictional history of Creek lands.

D. The "Implicit Holding" Of The Court Below Does Not Create Practical Difficulties Which Require Consideration Of This Case By This Court.

Positing that the Nation has no reservation, the United States expresses concern over administrative difficulties it believes would attend exercise of federal jurisdiction over checkerboarded Five Tribes allotments (Br., pp. 18-19). The reality, as respondents point out, is that Indian country jurisdiction exists in checkerboard fashion over much of Oklahoma, as well as elsewhere—such as South Dakota on the Indian-owned lands in the disestablished

[15] The Nation has been a party in numerous cases where such a record has been developed. E.g., *Muscogee (Creek) Nation v. Hodel, supra*; *Harjo v. Kleppe, supra.*

Lake Traverse Reservation and counties severed from the Rosebud Reservation. Compare *DeCoteau v. District of County Court*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). In actual practice "checkerboard" jurisdiction is far less troublesome than the United States admits. In areas where these is split jurisdiction, cross-deputization or similar agreements are common between law enforcement personnel. Under such agreements, for example, a state police officer will arrest Indians suspected of crimes, later surrendering the suspects to federal or tribal authorities if it turns out the offense occurred on Indian land.

In any event, the intent of Congress is controlling, and there is no evidence that Congress has ever intended to subject tribal members on restricted allotments and the Five Tribes themselves to complete state taxing and regulatory control. Rather, as at Lake Traverse and Rosebud, Congress was at most evidently "satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs." *DeCoteau*, 420 U.S. *supra* at 446. As this Court observed in *DeCoteau*, "[i]n such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments," *ibid*, which results of course in a checkerboard jurisdiction depending on land ownership.

In terms of practical consequences, the balance of equities is decidedly in favor of *amicus*. The impact of full state criminal, civil, taxing and regulatory jurisdiction over all its members lands would be utterly destructive of the Nation's vital powers of self-government, much more disastrous than implementation of practical arrangements to administer the checkerboard jurisdiction feared by the United States.

CONCLUSION

The petition should be denied.

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